IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVIDION

D. C. WALLACE and
TEXAS COTTON GINNERS ASSOCIATION

PLAINTIFFS

V.

W. A. THOMAS, FRANK SCOFIELD,
O. B. MARTIN, S. D. BENNETT,
CLYDE O. EASTUS,
DOUGLAS W. McGREGOR, and
WILLIAM R. SMITH,

DEFENDANTS.

NO. 152
In Equity

BRIEF ON BEHALF OF DEFENDANTS

By direction of the Court at the conclusion of the hearing in Sherman, Texas, on June 25, 1935, the defendants submit herewith their brief upon all aspects of the case, including their several motions to dismiss the bill of complaint upon which the Court reserved decision, and including also the questions presented by the testimony given and the exhibits introduced upon the hearing.

In this brief the following points will be discussed in the following order:

The motions to dismiss the bill of complaint should be granted.

The Bankhead Act is a valid exercise of the taxing power of the United States.

The Bankhead Act is a valid exercise of the Federal Commerce Power.

The Bankhead Act does not violate the Fifth Amendment to the United States Constitution.

The Bankhead Act does not unconstitutionally delegate legislative power to the Secretary of Agriculture and the Commissioner of Internal Revenue. The regulations promulgated by the Commissioner of Internal Revenue are valid, and are not broader than the provisions of the Bankhead Act.

The Bankhead Act and the regulations issued thereunder are entitled to the presumption of validity, and that presumption has not been overcome by the plaintiffs.

The plaintiffs have failed to show either that they will suffer any irreparable injury in 1935, or that they lack an adequate remedy at law.

The plaintiff Wallace is estopped from questioning the constitutionality of the Bankhead Act.

Statement of the Case

The plaintiffs herein have brought their action in an effort to obtain a final injunction restraining the defendants both from compelling any of the cotton ginners of the State of Texas to comply with the provisions and regulations of the Bankhead Act, and from attempting by suits or prosecutions to collect from any cotton ginner in the State any tax, penalty or fine under the Act or the regulations for a failure to comply therewith.

The two nominal plaintiffs attempt to sue on behalf of all of the ginners of cotton in the State of Texas, the plaintiff Wallace both for himself and for all others claimed to be affected by the Bankhead Act and regulations, and the plaintiff Association on behalf of its members. They have joined as defendants the two Collectors of Internal Revenue for the State of Texas, and the four United States Attorneys in the State.

The bill of complaint claims that this Court has jurisdiction over all of the defendants under Title 28, U. S. C., Section 113, and over the cause of action in that it arises under an Act of Congress (the Bankhead Act) "which is a revenue law providing for Internal Revenue." They assert the unconstitutionality of the statute on the following grounds:

(1) That it constitutes an attempt on the part of Congress to control and regulate the production and ginning of cotton within the several states, in violation of the Tenth Amendment to the Federal Constitution.

(2) That it is not a valid exercise of the taxing powers of Congress, but is an arbitrary attempt to regulate, by means of penalties and fines, the production and ginning of cotton.

(3) That it deprives the ginners in Texas of liberty and property without due process of law in violation of the Fifth Amendment to the Federal Constitution.

(4) That it delegates legislative powers to the Secretary of Agriculture and the Commissioner of Internal Revenue in violation of Article I, Section 1, of the Federal Constitution.

(5) That it is an invalid exercise of the power of the Federal Government to regulate commerce, and is in violation of the Tenth Amendment to the Federal Constitution.

Issue was joined upon these allegations by the denials contained in the answer of the defendants to the bill of complaint. The answer was

by direction of the Court served and filed during the course of the final hearing, and was understood by all parties and by counsel to be served and filed without prejudice to the pending motions to dismiss the bill of complaint.

The bill of complaint further alleges that various articles of the regulations promulgated by the Commissioner of Internal Revenue for the administration of the Bankhead Act are void and of no legal effect because they are broader than the Bankhead Act itself and constitute an attempt by the Commissioner to legislate. These claims also are denied by the defendants' answer to the bill of complaint.

POINT 1

THE DEGENDANT'S MOTIONS TO DISMISS THE BILL OF COMPLAINT SHOULD BE GRANTED.

A.

The plaintiff Wallace has attempted to join as plaintiffs with him all of the other ginners of cotton in the State of Texas, who, as he alleges, are affected by the Bankhead Act "in the same manner in which this plaintiff is affected." He bases this right of joinder upon Equity Rule 38, which provides:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole."

It should be noted that plaintiff Wallace nowhere alleges or claims that he has any permission or authority to represent these other citizens and Texas ginners in his attack upon the statute in question. Even assuming (without conceding) that the other ginners are affected by the statute as he is, it does not follow either legally or logically that they have any desire for themselves and for their own respective accounts to maintain such an action as this, or to endeavor to bring about a judicial declaration of the invalidity of the statute.

Also, it is patent, not only from the evidence before the Court but from facts within the personal knowledge of the Court and facts of which he may take judicial cognizance, that the circumstance of one ginner's (in this case Wallace) incurring what he claims unreasonable and excessive expenses in complying with the statute and regulations, and the alleged taking of his property without due process, does not have a similar result as to all ginners in the State. It is entirely possible, and even probable, that the additional administrative trouble encountered by the other ginners has not been and will not be at all onerous to them, but may easily be taken care of under their system of keeping books and performing otherwise the functions of ginners of cotton.

The authorities set forth in the typewritten brief filed with the Court in support of the defendant's motion to dismiss the bill of complaint should require only citation at this point and not elaborate discussion. As the Supreme Court stated, in Mathews v. Rogers, 284 U. S. 521, at 530:

> "While the present bill sets up that the single issue of constitutionality of the taxing statute is involved, the alleged unconstitutionality depends upon the application of the statute to each of the appellees, and its effect upon his business, which is alleged to be interstate commerce. The bill thus tenders separate issues of law and fact as to each appellee, the nature of his business and the manner and extent to which the tax imposes a burden on interstate commerce. The determination of these issues as to any one taxpayer would not determine them as to any other. There was thus a failure of such identity of parties and issues as would support the jurisdiction in equity."

See also Scott v. Donald, 165 U. S. 155; State of Ohio v. Cox, 257 Fed. 334; Raich v. Truax, 219 Fed. 273, affirmed 239 U. S. 33; and Baker v. City of Portland, 5 Sawyer 566.

Hill v. Wallace, 259 U. S. 44, was not a "class suit" and the point here under discussion did not arise in that case. The bill was filed by eight members of the Chicago Board of Trade "in behalf of all other members of that body who may wish to join and share in the relief granted" but no point was made of their right so to sue. Consequently that case is no authority for or against the plaintiff Wallace's claim of right to represent other ginners.

Accordingly, it is submitted that plaintiff Wallace may not properly maintain this action for other ginners in the State, and to the extent that he attempts to do so, the bill of complaint should be dismissed.

B.

THE PLAINTIFF TEXAS COTTON GINNERS ASSOCIATION IS AN IMPROPER PARTY PLAINTIFF AND HAS NO STANDING WHATSOEVER BEFORE THIS COURT

It is alleged in the bill of complaint that this Association was incorporated for the purpose of promoting the interests and welfare of its individual members, who are cotton ginners in this State, and that as an association and corporate entity this plaintiff "is not directly affected by the terms and provisions of the * * *Bankhead Act." It attempts to join its members as plaintiffs pursuant to Equity Rule 38.

It should be noted that the original bill contains no allegations either that the institution and prosecution of litigation come properly

within its powers, or that it has received any authority from its members to bring and maintain the action. This defect in pleading is attempted to be remedied by the filing of amendments to the bill of complaint, and the Association endeavors to establish by plaintiffs' Exhibits Nos. 7 to 11, inclusive, that it has legal power to maintain the action, and that it has been authorized by its membership to do so.

Examination of plaintiffs' Exhibits Nos. 8, 9, 10 and 11 will disclose that the Association has not received any sufficient or adequate authority from its membership either to bring this action or to represent its members in this litigation. The action taken by the membership at its Dallas meeting in April, 1935, was extremely informal and provides no basis for the action of the Executive Committee in bringing this action.

The admission in the bill that the Association is not in any was affected by any provisions of the statute under attack is absolutely fatal to its claim to be properly before the Court in its prayer for injunctive relief. This statement finds ample support in the cases cited in the defendants' brief supporting the motions to dismiss. See Georgetown v. Alexandria Canal Co., 37 U. S. 1; and cases cited under "A" supra.

Accordingly, we submit that the bill of complaint brought by the plaintiff Association should be dismissed in toto.

C.

THE BILL OF COMPLAINT BY THE PLAINTIFF WALLACE AGAINST DEFENDANT BENNETT AS UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF TEXAS SHOULD BE DISMISSED.

Plaintiff Wallace bases his right to injunctive relief against defendant Bennett upon his allegation that if he fails to comply with the Bankhead Act and regulations in 1935 he will incur the possibility of prosecution by defendant Bennett, and the suffering of fines and penalties and possibly imprisonment. He endeavored to support this allegation by calling Mr. Bennett as a witness and adducing from him testimony to the general effect that if he as United States Attorney learned of violations of the statute and regulations he would probably under the direction of the Attorney General of the United States institute such prosecutions as would be proper under the statute and regulations.

In Campbell v. Medalie, 71 Fed. (2d) 671, the Circuit Court of Appeals for the Second Circuit had before it an appeal from a dismissal of a bill claiming that the Act of March 9, 1933, and an Executive Order of the President requiring every person having gold bullion to file a return with the Collector of Internal Revenue were unconstitutional, and that his conviction for violation of that action would subject him to disbarment and would cause him irreparable injury. Upon such grounds he sought an injunction enjoining the United States Attorney from prosecut-

ing an indictment based upon his violation of the statute. The Circuit Court of Appeals affirmed the dismissal of the bill and held that there was no occasion for the issuance of an injunction, since the defense that the statute and Executive Order were unconstitutional could and should be raised as a defense to a criminal prosecution thereunder.

> "If appellant, a lawyer, be convicted, he may be disbarred, but that is insufficient reason for a court of equity to interfere with the normal prosecution of a criminal indictment. If the indictment be bad or the statute, for any reason suggested by the appellant, be unconstitutional, his remedy at law is still adequate and sufficient. The usual purpose of a suit in equity is the protection of rights of property. An injunction will be granted only where the facts disclose the likelihood of immediate and irreparable damage to property." (Citing cases in support.)

In Richmond Hosiery Mills v. Camp, 73 Fed. (2d) 315, the plaintiff, a manufacturer of hosiery, filed a bill to enjoin the United States Attorney from prosecuting it for violating a code of fair competition adopted for the hosiery industry under the National Industrial Recovery Act, upon the claim that the Code was unconstitutional. In that case it appeared that the United States Attorney had threatened to cause the plaintiff to be indicted for a single violation of the Code. The District Court dismissed the bill and the Circuit Court of Appeals affirmed the dismissal, holding that if the Code or the Recovery Act, or both, were unconstitutional, the plaintiff could raise that defense in a criminal prosecution for the violation of the Code, and that the plaintiff therefore had an adequate remedy at law but no proper claim for injunctive relief.

Similarly, in Penn v. Glenn, decided by the District Court for the District of Kentucky (Dawson J.) onApril 13, 1935 (officially not reported and unofficially reported in Prentice Hall Tax Service 1935, Vol. 1, p. 1261-1264, paragraph 1243.), the plaintiffs sued the Collector of Internal Revenue and the United States Attorney for an injunction, praying in part that the United States Attorney be restrained from prosecuting them for failure to comply with the Act of June 28, 1934, commonly known as the Kerr-Smith Tobacco Act. Although the Court in that case held that the suit before the Court was purposed entirely to regulate and control the production of tobacco, and was therefore invalid, it further held that the defendant, the United States Attorney:

> "* * * has no such direct and personal interest in this controversy as has the defendant, Glenn, as Collector, and as no case is alleged or made out against him for an injunction, I can conceive of no reason why he should be continued as a party defendant, and the proceeding is dismissed as to him, at the cost of plaintiffs."

These cases clearly establish that the plaintiff, Wallace, and, in fact, all of the plaintiffs who are properly before the Court, are not entitled to an injunction against the defendant Bennett. As in those cases, it does not appear that the plaintiffs here will be subject to more than a single criminal prosecution if they fail to comply with the statute and regulations, and if such a prosecution is instituted by defendant Bennett the defendant in such action may then raise the alleged invalidity of the statute. In addition the plaintiffs here may adequately raise the legal questions here attempted to be presented by suing the proper Collector of Internal Revenue to recover the amount paid as tax, and accordingly they do not encounter the risk of a successful defense to a single criminal prosecution.

The single exception to the rule that the court of equity has no jurisdiction to enjoin the prosecution of criminal proceedings is demonstrated by such cases as Ex Parte Young, 209 U. S. 123; Tyson & Bro. v. Banton, 273 U. S. 418; Packard v. Banton, 264 U. S. 140; and Terrace v. Thompson, 263 U. S. 187.

In Ex Parte Young, the statute under attack was a law of Minnesota relating to the enforcement of rates to be charged by intrastate carriers for freight and passengers and the statute contained provisions respecting punishment for violations. The stockholders of a railroad company brought a bill to enjoin the Company from complying with the statute and incidental to the decision of the case the court considered the right of the plaintiffs to invoke the equity process of the Federal Court. In upholding the jurisidiction of the court the Supreme Court held that the case represented an exception to the general rule and based its decision upon the punitive conditions of the statute under question. The alternative for the railroad company was either to obey the statute or to violate it and incur the danger of enormous fines and possible imprisonment.

> "The necessary effect and result of such legislation must be to preclude a resort to the courts of testing its validity. The officers and employees could not be expected to disobey any of the provisions or the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the Company."

No logical comparison may be made between the law under consideration in that case and the Bankhead Act. In the latter instance, the validity of the statute may quite adequately be tested by the normal and regular procedure of an act against the Collector of Internal Revenue for a refund of the tax.

A decision similar to Ex Parte Young is that of Tyson & Bro. v. Banton, 273 U. S. 418, which held that equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments when, but only when, the prevention of such presecutions is necessary to

protect the rights of property. As in Ex Parte Young the statute before the court contained penalties extremely drastic and there was no choice given the taxpayer except to comply with the statute or to violate it.

The authorities on this subject are referred to and reviewed in the Supreme Court decision of Terrace v. Thompson, 263 U. S. 197, which again states the general rule as to the lack of jurisdiction of a court of equity except when the exercise of that jurisdiction is essential to avoid irremediable and irreparable injury of property rights. In that action a suit was brought to enjoin the Attorney General of Washington from enforcing the Anti-Alien Land Law of that state. The motion of the Attorney General to dismiss the complaint upon the ground that it failed to state any matters of equity or facts sufficient to entitle the appellants to relief was granted by the District Court which entered a decree of dismissal. The Supreme Court affirmed that decree, holding incidentally that under the exception to the general rule persons affected by a law containing provisions for criminal punishment were not obliged to take the risk of prosecution and loss of property in order to secure an adjudication of their rights; but it cannot be disputed that the plaintiffs in the case at bar are not under any such hardship or choice of alternatives as confronted the plaintiffs in these exceptional instances.

D.

THE BILL OF COMPLAINT BY PLAINTIFF WALLACE AGAINST DEFENDANT BENNETT AS UNITED STATES ATTORNEY SHOULD BE DISMISSED FOR THE REASON THAT THE JURISDICTIONAL AMOUNT IS LACKING.

In the event that the Court should determine that the plaintiff Wallace is only the proper party paintiff in the action, his bill of complaint should be dismissed in toto upon the ground that his action against the defendants concededly involves less than $3,000, the minimum amount necessary under Judicial Code, Section 24, to invest this Court with jurisdiction to hear the matters at issue.

The plaintiff Wallace's bill of complaint specifically alleges that his 1934 expenses totalled $770.98, and his probable 1935 expenses will approximate $750 and he made no other claim and adduced no different proof in his testimony upon the trial. He testified that the value of his gin is approximately $20,000 but he made no effort to claim or to prove that this entire sum or that his entire property was in jeopardy under a continuance of the statute and its regulations.

He attempts to bring the case within the jurisdiction of the Court by alleging that it arises under a "revenue law providing for internal revenue" (Paragraph 1 of bill of complaint), but the entire case is based upon the entirely contradictory assertion that not only the primary but the sole purpose of the statute was to regulate production of cotton and not to raise revenue. The plaintiff may not properly be heard to contend

that the Court has jurisdiction of this cause because it arises under a law providing for revenue, and then to contend that the law is invalid because it is not intended to provide for revenue.

Also, it is not sufficient merely that the case should indirectly or probably involve the provisions of a revenue law, but the claim of the plaintiff must in itself directly arise under such law. In other words, the plaintiff's claim must, in order to fulfill the jurisdictional requirements, require of its own force enforcement or construction of a revenue law, and such enforcement or construction must arise in the plaintiff's own case and not in its rebuttal. It is of course the defendants' position here that the Bankhead Act is actually and primarily a revenue measure (and this point is discussed post); but the plaintiff may not invoke jurisdiction by involving such a Federal question indirectly in the way of anticipating that the defendants' position will involve such a point of Federal law. Louisville & Nashville R. R. Co. v. Mottley, 211 U. S. 149; Metcalf v. Watertown, 128 U. S. 586; Minnesota v. Northern Securities Co., 194 U. S. 48; Joy v. St. Louis, 201 U. S. 332; Devine v. Los Angeles, 202 U. S. 313; Barnett v. Kunkel, 264 U. S. 16.

The Bankhead Act can in no sense be said to create a cause of action in the plaintiff Wallace; accordingly, in view of his failure to show any other basis for the jurisdiction of the Court, the bill of complaint as to him should be dismissed in toto.

E.

IF THE COURT CONCLUDES THAT THE DEFENDANT BENNETT IS NOT A PROPER PARTY DEFENDANT, THE ENTIRE BILL OF COMPLAINT SHOULD BE DISMISSED AGAINST ALL OF THE DEFENDANTS, FOR THE REASON THAT THERE WILL THEN BE NO DEFENDANT BEFORE THE COURT WHO IS A RESIDENT OF THE EASTERN DISTRICT OF TEXAS WITHIN THE REQUIREMENTS OF SECTION 112 OF THE JUDICIAL CODE.

Counsel for the plaintiffs conceded that if the bill or the case is dismissed as against the defendant Bennett, the whole suit must fail as there would then be no defendant resident in the Eastern District, as required by the Judicial Code, Section 112.

F.

THE BILL OF COMPLAINT SHOULD BE DISMISSED IN TOTO AND AGAINST ALL OF THE DEFENDANTS UNDER REVISED STATUTES, SECTION 3224, TITLE 26, U.S.C., SECTION 154.

That section provides: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," and it and the decisions hereinafter referred to exemplify the policy of the Government that the collection of revenue, which is essential to the performance of the functions of the Government, shall not be interfered with by judicial process restraining the collection of taxes, but rather

that the right of the taxpayer to complain of the invalidity of the taxing statute in question, or otherwise to assert his legal rights as a taxpayer, shall be enforced by some other judicial process than the injunctive remedy.

Even to concede the plaintiffs' claim that the tax levied by the Bankhead Act is a penalty and not a tax does not avoid Revised Statutes, Section 3224. The Supreme Court has specifically held that even though a so-called "tax" is not a true tax but is a penalty designed to coerce compliance with an unconstitutional regulation by the Government, that section of the Revised Statutes nevertheless applies and forbids the issuance of an injunction to restrain the collection of such a "tax".

In Bailey v. Drexel Furniture Co., 259 U. S. 20, the Federal Child Labor Tax Law was held unconstitutional on the ground that it was not a true exercise of the taxing power but was a penal measure designed to coerce compliance with Federal regulation of a subject matter beyond the scope of the constitutional powers of the Federal Government. But on the same day on which that case was decided, the Supreme Court held, in Bailey v. George, 259 U. S. 16, that it was error to enjoin the Collector of Internal Revenue from collecting a tax assessed under the Federal Child Labor Tax Law because although the "tax" was in reality a penalty, Revised Statutes, Section 3224 was nevertheless applicable. The Court said:

> "The averment that a taxing statute is unconstitutional does not take this case out of the section (Rev. Stat. Sec. 3224). There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable. Dodge v. Brady, 240 U. S. 122, 126. In spite of their averment, the complainants did not exhaust all of their legal remedies. They might have paid the amount assessed under protest and then brought suit against the Collector to recover the amount paid with interest. No fact is alleged which would prevent them from availing themselves of this form of remedy."

Bailey v. George, supra, is therefore conclusive authority against the issuance of an injunction in this case. Even if the Bankhead Act is unconstitutional and the tax levied under it is held to be a penalty, no injunction may issue against the collection of the tax. In this case, as in Bailey v. George, supra, the remedy of the plaintiffs is to pay the tax, make demand for its return, and upon refusal of such demand sue the Collector.

To the same effect are Dodge v. Osborn, 240 U. S. 118, and Snyder v. Marks, 109 U. S. 189, in both of which cases the Supreme Court held that Revised Statutes, Section 3224, prevented the issuance of an injunction against a Collector of Internal Revenue, even though the tax which he was about to collect was unconstitutional. In Snyder v. Marks, supra, the court repudiated the contention that Section 3224 did not apply in the case of a void tax.

> "There is, therefore, no force in the suggestion that Section 3224, in speaking of a 'tax', means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained. The statute clearly applies to the present suit and forbids the granting of relief by injunction."

See also, Corbus v. Gold Mining Co., 187 U. S. 456; Dodge v. Brady, 240 U. S. 122; Phillips v. Commissioner, 283 U. S. 589; Cheatham v. United States, 92 U. S. 85; State Railroad Tax Cases, 92 U. S. 575; Pacific Whaling Co. v. United States, 187 U. S. 447.

The cases of Regal Drug Corp. v. Wardell, 260 U. S. 386, and Lipke v. Lederer, 259 U. S. 557, are clearly inapplicable to the case at bar. The Supreme Court held in these cases that the "tax" imposed by Section 35 of the National Prohibition Act was in fact a "penalty" in the nature of punishment for a criminal offense. In the Regal Drug Corp. Case the Collector had actually seized possession of the plaintiff's store and was proceeding to sell its stock of goods, and in Lipke v. Lederer, the Collector had stated that he was about to levy a warrant of distress. In those cases an injunction against the collection of the tax was absolutely necessary to prevent irreparable injury by the utter destruction of the plaintiffs' businesses. No such contention is made here.

Also, in Hill v. Wallace, 259 U. S. 44, and Miller v. Nut Margarine Co., 284 U. S. 498, there were presented situations in which an injunction was absolutely necessary to prevent the actual destruction of the entire business of the taxpayer. Under the decisions that circumstance is essential to take a case out of the prohibition of Section 3224; but in the present case no such contingency is presented by the evidence or even claimed. The plaintiffs and all of those for whom they claim to sue are in no position comparable in any way to the litigants in these cases constituting the exception to the general rule; they do have a perfectly adequate remedy at law; and if the Bankhead Act is invalid they may by a proper suit obtain a judicial determination of that fact.

THE INDUSTRIAL DEPRESSION FOLLOWING 1928.

The Bankhead Act is a part of a general legislative program instituted for the purpose of effecting a recovery from the economic crisis from which the country has been suffering. This court will take judicial notice of that crisis. Atchison Railroad Co. v. United States, 284 U.S. 294; Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S.398.

The industrial boom which had an inception following the World War, fostered in part by the demand for the replenishment of industrial products and in part by the artificial stimulation of huge and largely unsound foreign loans, had reached its climax in 1928-1929. Following that time saturated markets made the maintenance of continued large industrial production impossible.

The industrial boom had led to a world-wide orgy of speculation

in securities. In 1929 much of the international lending upon which the world's industrial and commercial activity had been largely built was suddenly withdrawn and put to more spectacular uses in the securities market. The cost of credit rose to alarming heights, checking commercial activity. Industrial production in the United States began to recede. Widespread unemployment ensued. Then followed the securities market crash of October, 1929.

Numerous expedients were used to check temporarily the collapse of prices. Nevertheless, unemployment continued to increase, consumers' incomes failed, and commodity and securities prices reached new lows. The national credit structure began to weaken.

The curtailment of markets was aggravated by additional tariff barriers; and in the summer of 1931, in spite of a moratorium on foreign debts, there followed a series of central bank crashes in Europe; England was forced off the gold standard; and gold began to be exported from the United States in large quantities. There followed complete loss of public confidence in the banks; and by March 4, 1933, the entire national banking system of the United States had collapsed.

Effect on Agriculture of the Economic Crisis.

The fate of agriculture, as a consequence of the depression, was worse than that of industry generally. While the level of agricultural prices during the period 1909-1914 had been somewhat improved by the demands for farm products caused by the world war, following the war this advantage was soon lost. From 1920 to 1932 the disparity between farm prices and the prices paid for industrial goods constantly increased, until farm products had only half of their pre-war purchasing power. While in 1909 receipts from agricultural products had constituted 18.9% of the total national income, in 1932 they were only 7.5% (Ex. D-1-B). Even in the pre-war period agricultural income was at a disadvantage, for in 1909 the per capita average of agricultural income was only 53% of the national per capita average. But by 1932 it had dropped to 30% (Ex. D-1-C).

Meanwhile the fixed charges to the farmer, represented by taxes and mortgage indebtedness, continued to increase. In 1932 the average mortgage debt per acre was nearly three times and taxes more than twice as high as in the pre-war years, and this notwithstanding that returns to the farmer per acre were much less.

Many of the expenses of the farmer, such as taxes and interest on mortgage indebtedness, are constant and do not decrease with lessened income. Many expenses of operation are also relatively constant. As a result, the remaining income available to the American farmer as net farm income fell from over 12 billion dollars in 1919 to approximately 2 1/2 billion dollars in 1932 (Ex. D-1-D). Hence the net return to the farmer decreased in far greater proportion than the gross money yield from his crops.

The effect of the Depression on Cotton Growers.

Cotton growers, as a class, were among those most severely affected by the economic depression. Although both the exportation and the domestic consumption of cotton increased during the post-war period, production increased even more rapidly, going from a production of less than 7 1/2 million bales in the crop year 1921-1922 to nearly 18 million bales in 1926-1927. The following year (1927-1928) production fell to a figure under 13 million bales, but thereafter increased to over 17 million bales in 1931-1932 (Ex. D-6-E). Meanwhile reduced buying caused by the effect of the depression on consumers' incomes and curtailment of demand caused by the slackening of industrial activity decreased the consumption of cotton, which lessened in much the same ratio as the decrease in consumption of industrial products (Ex. D-9-B). As a consequence, the carry-over of cotton increased to new highs, and the United States entered the crop year 1932-1933 with a carry-over of 12,960,000 bales (Ex. D-3-D), equal substantially to the consumption requirements of American cotton for an entire year (Ex. D-2-A). Meanwhile the world carry-over in foreign cotton was fairly constant; the increase was almost entirely in American cotton (Ex. D-3-E). American cotton prices declined drastically (Ex. D-2-C).

The gross returns to cotton farmers decreased from between $1,200,000,000 and $1,700,000,000 annually during the period from 1922-1930 to less than one-half billion dollars in 1932-1933 (Ex. D-7-E).

While many factors affect cotton prices, the greatest and the most direct is the supply, the demand being in its nature fairly constant irrespective of price. The supply available in any season consists of the current production plus the carry-over from previous years. While current production greatly affects prices, carry-over is equally important. The tendency for prices to vary inversely with the amount of the carry-over is seen in Exhibits D-2-C and D-9-A. The same tendency may be seen from a comparison of cotton prices with quantities of cotton in public storage (Ex. D-5-B). Excessive supply caused by large production and particularly by the huge carry-over was thus the principal cause of the disastrously low price of cotton in 1932.

In the face of diminished incomes the cotton farmer was forced drastically to curtail his expenditures. The general financial stringency which accompanied the decrease of income from cotton may be seen from the figures for bank deposits, which closely paralleled the price of cotton. As the price of cotton fell from a level of approximately 20¢ per pound in 1927 to less than 6¢ per pound in 1932, demand deposits in rural communities in the Richmond, Atlanta, St. Louis and Dallas Federal Reserve Districts fell from an aggregate of 808 million dollars to 348 million, a decrease of over 56%. In the Dallas District the decrease amounted to nearly 60% (Ex. D-6-D).

This stringency and the accompanying decrease in farm values wrought havoc with the banking facilities of the smaller communities. The acuteness of the situation may be seen from the increase in bank suspensions in the period from 1929 to 1931. In 1931 more than eight

times as many banks suspended payments as had done so two years before, and the amount of the deposits involved in such suspensions increased from a million and a half to over forty-nine million dollars.

The drop in the price of cotton was due not only to the lack of purchasing power in the United States, but also to the inability of foreign countries to buy. While in 1914 the United States was on the whole a debtor nation to the extent of 2 1/4 billion dollars, the war and post-war era sharply reversed the situation, resulting in a credit balance in favor of the United States of 24.4 billion dollars (Ex. D-10-B). Such a balance rendered further sales abroad practically impossible upon a credit basis; and the building up of higher and higher tariff walls and the relatively decreasing volume of imports into the United States as compared with exports (Exs. D-10-B and D-10-C) rendered difficult the exportation of cotton as part of current transactions. It was therefore evident that foreign markets offered no adequate solution for the difficulties of the cotton farmer.

The difficulties of finding an export market were not peculiar to cotton; they occurred even more disastrously in the case of other agricultural products. While cotton exportation during the crop year 1934-1935 was 61% of its volume in previous years, as determined by reference to a prior base period, the exportation of wheat was only 28% of that during the previous period (Ex. D-3-A). Similarly, while the value of the cotton exported during the 1934-1935 crop year was, by reference to the same period, only 88%, the corresponding percentages for cured pork, lard, and wheat were, respectively, 74, 46 and 25% (Ex. D-3-B). It is therefore evident that the difficulties of maintaining the foreign market of the United States in the exportation of cotton were of fundamental character. The international situation had destroyed the effective support of a foreign market for the cotton grower; little or no improvement could be hoped for in the export demand. Comparison of figures of American production and exportation indicates that the volume of exports does not increase directly in response to increase of production (Ex. D-10-D). A comparison of cotton price and net income to American cotton producers indicates that the price rather than the volume of cotton exports is the controlling factor affecting the interests of the American farmer (Exs. D-10-C and D-4-C).

Relation Between the Ginning Tax and the Price of Cottons.

A tax upon the ginning of all cotton raised in excess of reasonable current consumption demands is of a character to accomplish the result of freeing the market and the channels of commerce from the stagnating and paralyzing effect of the low prices which inevitably accompany excessive supplies and from the nationally ruinous result of the lack of purchasing power in the farmer. By raising the price of the marginal excess supply of cotton, such a tax prevents the horizontal cut of cotton prices which would otherwise force the price of all cotton down to the sacrifice level created by over-production. In this the Bankhead tax operates precisely as a moderate protective tariff does, i.e. it adds a further element of cost to the competing product sufficient to preserve substantially the same price levels which would obtain without

its competition. Since a reasonable production is exempted from tax, the tax does not raise prices above a fair minimum. Like a protective tariff, the Bankhead Act constitutes a federal tax existing partly for revenue and partly for the protection of an industry, the prosperity of which is deemed essential to national welfare.

Commerce in cotton is essentially interstate and foreign commerce. The extensive exportation of American cotton in foreign commerce is shown in Exhibit D-7-D. The principal cotton producing states consume only a very small percentage of the cotton which they produce (Ex. D-5-A). All of the cotton produced in Texas except an amount ranging from .9% to 3.8% is shipped in interstate or foreign commerce (Ex. D-5-A). The actual interstate movement of cotton is graphically shown in Exhibits D-5-D and D-4-A.

The tax collections of the Bankhead tax are shown on Exhibit D-4-E. The collections which might have been expected had the drought not interfered with normal production would have been much larger (Ex. D-7-B).

Effect of the Operation on the Bankhead Act.

Since the Government's cotton program, beginning with the plow-up operations of 1933, and including the cotton loans and the ginning tax under the Bankhead Act, the cotton situation has improved in many important respects.

No great increase in American production of cotton occurred in 1934 over the preceding year (Ex. D-6-E); and the production was obtained with greater acreage efficiency (Ex. D-10-A). The enormous carry-over of nearly 13 million bales with which the United States entered the 1932-33 season has been reduced to the smaller, although still excessive, figure of 11 1/2 million bales (Ex. D-3-D). Prices improved from 5.89 cents per pound in 1931-1932 to 7.15 cents in 1932-33 and 12.50 cents for the year 1934-1935. (Ex. D-10-E).

The improvement in the cotton situation was accompanied by increasing general prosperity. Rural deposits throughout the South increased in 1933, and made a still further increase in 1934 (Ex. D-6-D).

Conditions in Texas improved similarly. Subsequent to certain liquidations which immediately followed the banking holiday of March, 1933, there have been no suspensions of Texas banks (Ex. D-6-A). The December index of bank deposits for rural Texas banks, which had already reflected improved conditions in 1933 by an increase from 58.4 to 70, showed a further gain in 1934 to the figure 80.00 (Ex. D-6-C). The improved conditions throughout the South were also indicated by increases in carlot shipments to the sections of the country benefited by the higher cotton prices (Ex. D-9-E), in which shipments of goods used primarily in agriculture showed the greatest increases. General interstate rail transportation which had suffered severely in 1931 and 1932 also showed moderate recovery in 1934 (Ex. D-8-A).

That the benefits to cotton producers accomplished by the Government's cotton program have not been carried disproportionately far appears from the fact that the increase in the price of cotton has been accompanied by an increase in the general price level of the goods which farmers buy; and parity of the cotton farmer's earning power with that in the base period 1909-1914 (the declared goal of the Agricultural Adjustment Act) has not yet been achieved (Ex. D-8-C).

POINT II.

THE BANKHEAD COTTON ACT IS A VALID EXERCISE OF THE TAXING POWER

A.

THE ACT IS A TRUE REVENUE MEASURE.

Although as pointed out by counsel for the plaintiffs, a somewhat similar bill was introduced in the Senate, but the statute now before the Court originated in the House of Representatives for the reason, as stated, that being a revenue measure it would of necessity have to originate in that branch of the Congress. Its enacting clause states that it is an act "to provide funds for paying additional benefits under the Agricultural Adjustment Act". The Declaration of Policy recites that the purpose of Congress is to "raise revenue to enable the payment of additional benefits to cotton producers under the Agricultural Adjustment Act." The Act levies and assesses an excise tax on the ginning of cotton and provides for the filing of tax returns. Like any other revenue measure the tax is to be collected by the Commissioner of Internal Revenue and paid into the Treasury of the United States. All provisions of law, including penalties, applicable with respect to the taxes imposed by Section 800 of the Revenue Act of 1926 are made applicable with respect to the taxes imposed by the Bankhead Cotton Act. The proceeds derived from the taxes levied by the Act are by that Act authorized to be appropriated to be made available to the Secretary of Agriculture for the purposes of carrying out the cotton program of the Agricultural Adjustment Administration and for administrative expenses and refunds of taxes under the Act. Many other like provisions usually found in Revenue measures such as provisions for refunds, filing of claims, filing of returns, etc., are found in the Bankhead Cotton Act.

The Commissioner of Internal Revenue with the approval of the Secretary of the Treasury acting pursuant to the power vested in him by the Bankhead Cotton Act has prescribed detailed regulations for the collection of the tax, in form and substance similar to any other such regulation for the collection of internal revenue of the United States, and under this Act has collected from the ginning of the 1934-35 cotton crop almost one million dollars which has been paid into the United States Treasury. The amount of revenue thus derived from the tax imposed by this statute is in excess of the amount of revenue derived from similar taxes for the year 1934. Thus the amount of the tax is in excess of that collected from

miscellaneous taxes on narcotics ($495,270.15); from adulterated and process or renovated butter, mixed flour and filled cheese ($14,984.59); from processing taxes under the Agricultural Adjustment Act imposed upon processors of sugarcane and sugar beet ($170,416.37); from a manufacturer's excise tax on pistols and revolvers ($52,980.41); on cameras and lenses ($364,073.95); from stamp taxes on the use of yachts and boats ($180,672.98); on silver bullion transfers ($606.04); from tobacco taxes on small cigars ($173,018.13); from liquor taxes on grape brandy used for fortifying sweet wines ($106,855.57); from case stamps for distilled spirits bottled in bond ($79,695.61); from floor taxes imposed by the Liquor Taxing Act of 1924 on wines ($474,314.73); and from taxes imposed by the Act of March 22, 1933 on 3.2 wines ($27,699.91). (See Exhibit D-7-A).

It was further established on the trial that last year's crop was, on account of weather conditions, far below the average and below expectations when the Act was passed; and the tax revenues which would have been received for varying productions of the crop are shown by Exhibit D-7-B.

Even if we assume that the tax is prohibitive, such fact would not weigh against its constitutionality. The Supreme Court has always held that the reasonableness of the rate of a tax is a question entrusted solely to the discretion of Congress, and in the fixing of the rate of a tax Congress is responsible only to the electorate, not to the courts. There is no constitutional limit upon the rate of taxation. In many cases taxes have been sustained as constitutional which were so excessive in rate as to be utterly prohibitive of the transaction taxed.

See McCray v. United States, 195 U.S. 27, 60; Magnano Co. v. Hamilton, 292 U.S. 40; Spencer v. Merchant, 125 U.S. 365, and Flint v. Stone Tracey Co., 220 U.S. 107; Veazie Bank v. Fenno, 8 Wall. 533.

The plaintiffs may contend that the tax exemption of 10,000,000 bales negatives any claim of the exertion of the taxing power, but the mere fact that the Act provides for certain exemptions does not render it any less a revenue measure for no revenue measure of major import has been passed by Congress that does not provide for some type of exemption of more or less elaborate nature. It is within the constitutional power of Congress in levying an excise tax to create exemptions. An obvious illustration in support of such procedure is found in the exemption features of the income tax law, the validity of which was expressly upheld in Brushaber v. Union Pacific Railway Co., 241 U.S. 1. In McCray v. U. S., 195 U.S. 27 a much higher tax was imposed on yellow oleomargarine then on white oleomargarine. In Billings v. U. S., 232 U.S. 261, the Supreme Court upheld a tax on foreign-built yachts, although no similar tax was imposed on yachts of domestic construction.

The Supreme Court has on many occasions upheld as valid exercises of the taxing power statutes which patently had other purposes than the raising of revenue. It has held also that the fact that Congress enacted a statute with motives other than the collection of revenue and that the transaction taxed could not have been directly regulated under any of the powers granted to the Federal Government is legally immaterial.

Indeed, the Supreme Court has many times said that if a statute is in terms a taxing measure, the courts have no authority to inquire into the motives which prompted Congress to enact it.

In McCray v. United States, 195 U. S. 27, a Federal statute levied an excise tax of 10 cents per pound upon the manufacture or sale of artificially colored oleomargarine, while the tax on the manufacture of sale of uncolored oleomargarine was 1/4 cent per pound. It was contended that this tax was unconstitutional because its obvious purpose and effect were not to raise revenue but to eliminate the manufacture of colored oleomargarine, since the discrimination in the rate of tax upon the colored and uncolored oleomargarine made it impossible for colored oleomargarine to compete in the market. It was further contended that the Act in the guise of levying a tax, regulated the manufacture and sale of oleomargarine, a power reserved to the States and not the Federal Government. The Supreme Court sustained the constitutionality of the tax and disposed of these contentions in the following words:

> "It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department. * * *
>
> "It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. * * *

"Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their fact they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artifically colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise." (Underscoring supplied.)

This case establishes that in considering the constitutionality of a Federal taxing statute the function of the courts is limited to considering whether the terms of the Act levy a tax in compliance with the qualification laid down in Article I, Section 8 of the Constitution. It was perfectly obvious in the McCray case that in taxing colored oleomargarine at 10 cents per pound, Congress was not interested in raising revenue. With such a burden, colored oleomargarine could not possibly compete in the market with uncolored oleomargarine, and hence the taxing statute was designed to eliminate the very object which it taxed. Nevertheless, the Supreme Court held that although the necessary effect of the statute would be the elimination of colored oleomargarine from the market, since the Act was in terms an exercise of the taxing power, the motive of Congress in passing the Act could not be considered by the Court.

The principle established in the McCray case, supra, that the power to tax may constitutionally be employed to effect ulterior ends which could not constitutionally be attained by direct legislation upon the subject is squarely recognized by the Supreme Court in the recent case of Magnano Co. V. Hamilton, 292 U.S. 40. That case involved the constitutionality of a statute of the State of Washington which levied an excise tax of 15 cents per pound on all butter substitutes sold within the State. A company engaged in selling such products brought suit to enjoin the enforcement of the act on the ground that the purpose of the statute was to destroy the business of selling butter substitutes within the State, and that the statute confiscated the plaintiff's property in violation of the due process clause of the

Fourteenth Amendment. The Supreme Court sustained the tax, despite recognition that the obvious purpose and effect of the statute were not to collect revenue but to destroy the business of selling butter substitutes. The court said:

> "Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. McCray v. United States, supra, 56-59. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses. * * *
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> "The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant * * *
>
> "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment."

The tax sustained in this case cannot be justified as one imposed for the suppression of fraud (as might be said of the tax on colored oleomargarine sustained in the McCray case, supra) or for the suppression of traffic in articles deleterious to health or morals (compare United States v. Doremus, 249 U.S. 86, and the License Tax Cases, 5 Wall. 462). There was no contention that the public of the State of Washington was being deceived in the purchase of butter substitutes of that such products were in any respect unhealthful. The only conceivable purpose of the tax was to improve the business of dairy farmers in the State by eliminating the competition of butter substitutes. The Bankhead Act may be said to have a very similar non-fiscal purpose, to-wit: increasing the income of the cotton farmer.

United States v. Doremus, 249 U.S. 66, involved the constitutionality of the Harrison Narcotic Drug Act. That Act requires every person who produces or dispenses certain drugs to register with the Collector of Internal Revenue and to pay a tax of $1.00 per annum. It also forbids any such person to sell or give away drugs except on a written order on a form issued by the Commissioner of Internal Revenue. Persons dispensing drugs under such orders are required to preserve a duplicate of the order for two years, to be accessible to agents of the Commissioner of Internal Revenue. Physicians are permitted to dispense such drugs to patients in the course of their practice without such orders, but they are required to keep the name and address of the patients to whom such drugs are dispensed. The court sustained the constitutionality of the Act despite the obvious contention that the purpose of the Act

was not to raise revenue but to regulate traffic in drugs. The court reiterated its position in the McCray case, supra, that if a statute is in terms a taxing measure the court may not declare it unconstitutional on the ground that its real purpose and effect is to regulate conduct exclusively within the control of the States, and said at page 93:

> "And from an early day the court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. * * *
>
> "The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress — that is sufficient to sustain it."

And the Supreme Court quoted its statement with reference to this same statute made in United States v. Gin Fuey Moy, 241 U.S. 394, that:

> "It may be assumed that the statute has a moral and as well as revenue in view, but we are of the opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

So in the case at bar we may concede, arguendo, that the Bankhead Act has an end in view other than that of producing revenue, but it is in terms a revenue measure and in considering the argument that it is not a genuine taxing measure but is rather an attempt to regulate indirectly a subject which Congress could not regulate directly, the purposes, other than the collection of revenue, which Congress may have had in enacting this statute are legally immaterial.

In Felsenheld v. United States, 186 U.S. 126, the Supreme Court sustained as constitutional a provision of the statute levying as excise tax upon the manufacture of tobacco, forbidding the inclusion of any premium in any package of tobacco. It was conceded by all parties that the premium placed in the tobacco involved in the suit were of inappreciable weight and did not effect in any way the ascertainment of the proper amount of the tax or its collection. Nevertheless, the Supreme Court upheld this provision of the statute which, as applied to the tobacco in suit, could have no possible relevance to the raising of revenue, on the ground that such a provision insured purchasers of tobacco that they would not

receive any foreign substances in the tobacco purchased by them.

It is, of course, recognized that the principal purpose of tariffs is the fostering of American industries by protecting them from foreign competitors. Indeed, the two purposes of raising revenue and of protecting domestic industries may be said to be mutually inconsistent, for the more effective a tariff is in keeping foreign goods out of this country, the less revenue it will produce, and vice versa. The Protective Tariff Act of 1922 authorized the President to vary the rate of tariff on imported products whenever he shall determine that the existing rate of tariff does not equalize the differences in the cost of domestic and foreign production of an article. In holding this Act constitutional, in Hampton, Jr. and Co. v. United States, 276 U.S. 204, the Supreme Court stated that the fact that the tariff was enacted with the end in view of fostering domestic production of certain articles did not invalidate it as a revenue measure (page 411):

> "* * * no historian, whatever his view of the wisdom of the policy of protection, would contend that Congress since the first Revenue Act in 1789 has not assumed that it was within its power in making provision for the collection of revenue to put taxes upon importations and to vary the subjects of such taxes or rates in an effort to encourage the growth of the industries of the nation by protecting home production against foreign competition. *
>
> "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action. * * * And so here the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country, can not invalidate a revenue act so framed."

If Congress may exercise the taxing power in order to foster domestic manufacture, it would seem equally clear that it may, in the Bankhead Act, exercise the taxing power in order to improve the position of the cotton farmers in this country.

In two cases, Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, and Hill v. Wallace, 259 U.S. 44, the Supreme Court has held unconstitutional Federal statutes purporting to be exercises of the power to levy taxes, on the ground that the statutes demonstrated by their own provisions that they did not levy taxes at all, but were efforts to impose detailed regulation upon the conduct of businesses beyond the power of the Federal Government to regulate,

by penalizing the failure to comply with such regulation. An analysis of these two cases will show that the principle they enunciate is not applicable to the Bankhead Act.

The Federal Child Labor Tax Law involved in Bailey v. Drexel Furniture Co., supra, provided that any establishment employing children under the age of 14 years, or in which children between the ages of 14 and 16 had been permitted to work more than 8 hours a day or more than 6 days a week or after 7 o'clock p.m. or before 6 O'clock a.m. during any portion of the taxable year should pay an "excise tax" equivalent to 10% of the entire net profits received during such year from the sale or disposition of the product of such establishment. The Act further provided that the tax should not be imposed on any person who proved that his employment of child labor in violation of the provisions of the statute was made under a mistake of fact as to the age of such child. The Supreme Court held this statute unconstitutional on the ground that it imposed not a tax but a penalty to coerce compliance with a Federal regulation of a subject beyond the control of the Federal Government in the exercise of any of its constitutional powers. The court said:

> "If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. * * * If an employer departs from this prescribed course of business, he is to pay to the Government one-tenth of his entire net income in the business for a full year. The amount is not to be preportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employes five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be enacted. Scienter is associated with penalties, not with taxes.
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> "* * * Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation

> and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard."

The Child Labor Tax Law contained three features which were considered by the Supreme Court as demonstrating that the law was an attempt to coerce compliance with a detailed mode of regulation of conduct not subject to the regulatory powers of the Federal Government: (1) the amount of the "tax" was not apportioned to the value of the subject matter taxed, that is an employer who employed one child under 14 for a single day of the year was taxed at precisely the same rate as an employer all of whose employees during the entire year were within the prescribed age limits; (2) if an employer could show that his violation of the Act was caused by a mistake of fact as to the true age of the child employed, he was exempt from the tax; and (3) the Act itself laid down detailed regulation of a particular course of conduct (the employment of child labor) and imposed the "tax" only upon departures from that course of conduct. These three features of the Child Labor Tax Law clearly demonstrate that its sole purpose was not to collect revenue but to compel compliance with regulations of a subject matter committed exclusively to the control of the States. True excise taxes bear some relation to the value or amount of the object taxes, and "Scienter is associated with penalties not with taxes".

No one of the three features which induced the Supreme Court to hold the Child Labor Tax Law unconstitutional is present in the Bankhead Act. Under it the amount of the tax bears a uniform relation to the value of the transaction taxed for the rate of the tax is determined by the price of the cotton being ginned and the tax is imposed only on such cotton as is in excess of the producer's allotment. Nor does the Act contain any element of scienter in imposing the tax. Finally, the Act does not by its terms prescribe a detailed regulation of any course of conduct whatsoever.

The Child Labor Tax Law was unquestionably a coercive measure. There could be no doubt in the mind of any employer that in view of the tax it would be to his advantage to refrain from employing child labor for if he "departs from the prescribed course of business, he is to pay the Government one-tenth of his entire net income in the business for a full year". But the Bankhead Act has no such coercive effect. It cannot be contended that its purpose is to force cotton producers to enter into cotton reduction contracts with the Secretary of Agriculture under the Agricultural Adjustment Act for the tax is levied upon the ginning of all cotton alike and tax exemption certificates were available to, and in fact used by, cooperative and non-cooperative producers alike.

Further evidence that the purpose of the Act was not to force cotton farmers to sign cotton reduction contracts is found in the legislative history of the bill. The Committee on Agriculture in its report to the House on March 3, 1934 (Report No. 867) expressly pointed out that "the sign-up campaign for the 1934 program has just been completed, and again a large percentage of the cotton growers have cooperated in the program". Thus, at the time Congress enacted this statute, it knew that the voluntary program under the Agricultural Adjustment Act had been completed and hence it could not have been its intent to force producers to join the program by passing the Act.

Nor was it made a condition precedent to the receipt by producers of tax exemption certificates that they agree to comply with a "detailed and prescribed course of conduct" prescribed by the Secretary of Agriculture, as the plaintiffs in this case contend. On the contrary, though the Act provides that "no certificate of exemption shall be issued and no allotment shall be made to any producer unless he agrees to comply with such conditions and limitations on the production of agricultural commodities by him as the Secretary of Agriculture may, from time to time, prescribe", as a matter of fact the Secretary of Agriculture did not prescribe any conditions or limitations on the production of agricultural commodities which producers had to comply with if they were to receive tax exemption certificates, but freely issued tax exemption certificates to cooperative and non-cooperative producers alike. He has publicly stated that a similar course will be followed in the future.

The case of Hill v. Wallace, supra. involved the constitutionality of the Federal Futures Trading Act which imposed a tax of 20 cents a bushel on every contract of sale of grain for future delivery. It excepted from the tax contracts made by or through a member of a Board of Trade designated by the Secretary of Agriculture as a contract market and evidenced by a memorandum containing certain particulars to be kept for a period of 3 years or longer and to be available for inspection by the Secretary. The Secretary was authorized to designate Boards of Trade as contract markets if they complied with certain conditions specified in the Act. These conditions related to the keeping of memoranda of all transactions in grain, whether for cash or for future delivery, the prevention of the dissemination of misleading or inaccurate reports concerning crop or market conditions that tended to effect the price of commodities, the prevention of the manipulation of prices and the cornering of grain, and admission to the Board of Trade of any cooperative association of producers having adequate financial responsibility. The Supreme Court held the Act unconstitutional on the principle announced in the Child Labor Tax case, supra. that the Act showed on its face that it was in its essence a complete regulation of Boards of Trade, with a penalty designed to coerce compliance with regulations of a course of conduct which Congress could not constitutionally impose in the exercise of any of its powers granted by the Federal Constitution. The Court said at p. 66:

> "The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and it is so clear from the effect of the provisions, on the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."

But as we have demonstrated above in the discussion of the Child Labor Tax case, the principle that Congress cannot constitutionally, in the guise of a tax, regulate a course of conduct which is committed by the Constitution solely to control by the States, by prescribing a standard of conduct and penalizing departures from it is inapplicable to the Bankhead Act, for this tax is a tax on ginning and is not a penalty imposed upon a grower for his failure to enter into a crop reduction contract, or an effort to penalize him for growing cotton in excess of his allotment. Stating it most favorably to the plaintiffs, its only effect is to obtain revenue from the ginning of non-exempt cotton and, it may be (as in McCray v. United States, 195 U.S. 27; Magnano v. Hamilton, 292 U.S. 40; Veazie Bank v. Fenno, 8 Wall. 533; and other cases) incidentally to discourage the production of the taxable product.

Accordingly, the contention that the collection of revenue is not the sole motive for its enactment does not in any respect weigh against its constitutionality, as the cases discussed above demonstrate. This Act is not a coercive measure, as those declared unconstitutional in the Child Labor Tax case and Hill v. Wallace, supra, and hence the doctrine of these cases is inapplicable here. We, therefore, submit that the Bankhead Act is a valid exercise of the power of Congress to levy taxes.

B.

THE TAX IMPOSED BY THE ACT IS AN EXCISE AND IS UNIFORM THROUGHOUT THE UNITED STATES

The Act levies a tax upon the ginning of cotton and that process is defined as the "separation of lint cotton from seed cotton". The liability to pay the tax is that of the ginner with certain minor exceptions. The tax is thus one on the privilege of ginning cotton and it is settled beyond question that a tax of this nature is an excise and not a direct tax.

The tax is not levied on a person by reason of his ownership of property but is upon a particular activity, namely, the ginning of cotton, and is paid by the ginner whether or not he is the owner of the cotton. This tax comes clearly within the description of an excise, given by the Supreme Court in Knowlton v. Moore, 178 U. S. 41,88:

> "Excises usually look to a particular subject, the levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned."

In situations less clear than the instant one, the Supreme Court of the United States has declared that taxes are not direct taxes but are excises. Thus in McCray v. United States, 195 U. S. 27, the Court held that a tax on the manufacture and sale of oleomargarine was an excise tax and not a property tax. Likewise in Patton v. Brady, 194 U. S. 608, the Supreme Court upheld as a valid excise a tax on the manufacture of tobacco.

The tax considered in the case of Dawson v. Kentucky Distilleries Co., 255 U. S. 288, is readily distinguishable from the instant tax. In that case the court had before it the question whether or not a tax on liquor withdrawn from bond or otherwise removed from bonded warehouses in the State of Kentucky was a direct tax on property. The whiskey had originally been required by law to be put into bond by the owner. Therefore, if he were unable to obtain possession of it without paying a tax, the owner might well say that, from the beginning, the power of enjoying any of the privileges of owner-ship was denied him. Accordingly, the court decided that this was a tax upon the obtaining of possession of property by the owner thereof, and that such a tax upon the exercise of the "single power indispensable to the enjoyment of all other" powers was a direct tax on property. The court said (p. 294):

> "The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value * * *."

In the Dawson case, supra, the tax was upon the complete ownership of goods and, therefore, within the definition of a direct tax, whereas a tax levied upon the process of ginning cotton and imposed upon the ginner of cotton whether or not he is the owner of the cotton being ginned, is an excise.

If it be contended that because the right to gin cotton is one of the most important incidents of ownership and that a tax on that right is, therefore, a direct tax, a complete answer is afforded by Billings v. United States, 232 U. S. There is a tax confined to the use of pleasure vessels was held to be an excise though the only value of such a craft to the owner would lie in its use. At the same time, in Pierce v. United States, 232 U. S. 292, the court held a tax on the mere ownership of such pleasure vessels to be a direct tax.

In all of the above cases the tax under consideration was placed upon the owner of the property and the tax was upon one of the most important incidents of ownership. Nevertheless, the court held these taxes to be excise taxes. The tax imposed by the Bankhead Act is not nec-

essarily upon the owner of the cotton but upon the ginner whether or not he is the owner. It must necessarily follow from these decisions that such a tax upon the ginning of cotton is an excise and does not need to be apportioned among the States.

There can be no question that the tax imposed by the Bankhead Act is uniform throughout the United States. At an early stage in our constitutional history, as was pointed out in Veazie Bank v. Fenno, 8 Wall, 533, 541, the requirement of uniformity as to excises was not a limitation upon the power to tax, but simply a requirement as to the mode in which the plenary power was to be exercised. Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 13. This requirement imports a geographical uniformity merely, and is synonymous with the expression, "to operate generally throughout the United States". Knowlton v. Moore, 178 U.S. 41, 96.

In the present case it is obvious that the tax imposed by the Bankhead Act operates generally, i.e., it operates with the same force and effect in every place in the United States where cotton is ginned.

Accordingly, it is submitted that the tax in question complies with the only limitation upon the power of Congress to levy excise taxes of the character now under consideration.

POINT III.

THE BANKHEAD COTTON ACT IS A VALID EXERCISE OF THE FEDERAL COMMERCE POWER.

The Bankhead Cotton Act, as has been pointed out, imposes an excise tax on the ginning of cotton (see Treasury Regulations 84, Chapter III, Articles 4, 8). Like other excise taxes, it has the effect of increasing the cost of the commodity in connection with which it is imposed. Accordingly, since it is levied on the ginning of all cotton produced in excess of a fixed production allotment, it may tend to cut down the acreage which a cotton producer will plant and in that way bring about a reduction in the production of cotton. In fact, it may even reduce the volume of ginnings. In this respect its effect is identical with that of the Agricultural Adjustment Act, to which it is a necessary supplement. However, if it be demonstrated that such effects are clearly incidental to what shall be demonstrated to be a valid regulation of interstate commerce, they become completely irrelevant to the validity of the Bankhead Act as a regulation of interstate commerce. Were the tax imposed by the Bankhead Act directed wholly or primarily to the purpose of reducing production, there would be great force behind a contention that it is invalid as involving a regulation of production, which is a domestic concern of the individual states. It cannot, however, be contended that the aim which actuated Congress in enacting the Bankhead Act was that of limiting production, however true it may be that the means employed may bring about a curtailment of production.

The enactment of both the Agricultural Adjustment Act and the Bankhead Act were the outcome of a realization, expressed in their declarations of policy, that the economic ills burdening agriculture were due to a lack of balance between the production of agricultural commodities and the consumption thereof, and that efforts to remedy those ills must necessarily involve bringing the production and consumption of agricultural commodities to such levels as would enable farmers to receive for the commodities which they raised a fair and equitable return, in terms of the industrial and other goods that this country manufactures. To the extent that farmers get higher prices for their crop, their purchasing power is increased.

Historically, it is quite clear that increases and decreases in the farm price and farm value of cotton have generally kept pace with corresponding increases or decreases in the industrial prosperity of the farmer. (Exhibits D-4B, C and D; D-7E). Increased farm prices mean greater purchasing power in the hands of the farmers. This increasing purchasing power reflects itself in an enhanced demand for industrial and non-agricultural products, thereby diffusing prosperity among the industrial and other classes of this nation and enabling them in turn to purchase agricultural commodities. The bearing of this on interstate commerce and cotton is obvious. It is clear that the states which are the centers of production in the case of cotton differ widely from those which are centers of consumption. This necessarily implies that movement in interstate or foreign commerce characterizes most of the cotton produced (Exhibits D-5-A; D-7-D; D-9-C and D; D-10-D). For Texas, in fact, it would appear that 94 percent of the cotton produced moves in interstate or foreign commerce since, while the state produces great quantities of cotton, there are few mills present in the state to spin the cotton into yarn or cloth (Exhibit D-9-D). This movement in interstate commerce which cotton makes is a source of revenue, not only for the classes of the community involved in cotton production and cotton consumption, but also for the great number of people concerned with the transportation of cotton and the processes intimately connected with transportation and fitting the cotton for transportation, such as ginning, compressing, warehousing, etcetera.

The commerce with respect to cotton which is demonstrably interstate operates as a stimulant to commerce from non-cotton producing states. Such commodities as agricultural implements and bagging and ties, which are required by all cotton producers, are manufactured primarily in states other than the cotton producing states.

The factual analysis at the beginning of this brief renders it clear that this two-way commerce had been greatly obstructed and that the question in the Congressional mind was how to revive interstate commerce from the stagnant levels which it had reached.

It is observable that in the past, excessive supplies of cotton have gone hand in hand with very low prices. This inverse correlation between the price of cotton and the supply on hand for any given year may be observed to hold both for the world and the American cotton crop (Exhibits D-2-C; D-9-A; D-10-D and E). Periods of relatively small cotton

yields have brought to cotton farmers higher aggregate farm incomes (Exhibit D-7-E), for the increase in price obtained generally has more than offset the loss in total income due to a possible curtailment in the crop. In addition, cotton growing, like most agricultural industries, because of its year-wide duration is unable to adjust its production to meet fluctuations in demand. This relative inflexibility in the cotton industry was in great measure responsible for its unhealthy predicament, since cotton producers were, by their mere planting of the seed, committed to the production of a supply which only weather and soil conditions, the boll weevil, and other involuntary factors would be effective to cut down.

It seemed clear from the history of the cotton industry that the solution to the farm problem with respect to a commodity like cotton lay in dealing with the unmarketable surpluses of cotton that continually accumulated. Falling prices, the inevitable result of unmarketable surpluses and excessive carryovers of cotton, have had disastrous results on interstate commerce. One aspect of the fact that it becomes more and more unprofitable to market cotton in interstate commerce, is that cotton tends to accumulate at concentration points short of the ultimate destination of cotton at the end of its interstate journey, at the mill (Exhibit D-5-B). The other is the diminution of the volume of interstate trade that results from the decrease in purchasing power of the farmers, which has been described above.

The plan originally devised by Congress to cure such undesirable conditions was to keep these unmanageable surpluses off the market.

The Federal Farm Board inaugurated a program of governmental purchase of cotton and holding same off market. One disadvantage of this mode of restoring normal currents in interstate commerce was that the cotton thus bought by the Federal Farm Board constituted a continuous threat to the attainment of stabilized marketing condition, because it was always felt that it could be released and thereby jeopardize the favorable price levels that existed for the time being. Furthermore, the Farm Board itself recognized that a policy of buying cotton at high price levels was an extremely costly one and could be only a temporary expedient at best. The higher the price of cotton went, the more financially prohibitive it became to purchase the cotton, yet purchases were continually required in order to keep up the market price; the more purchases were made, the more assured it became that no reasonable outlet for the surpluses so bought could be found. In fact, the Farm Board liquidated its obligations in cotton with a loss to the Government of some$150,000,000. The Farm Board bluntly admitted that its efforts were but makeshifts and that permanent relief could only come about through the producers actively reducing their production of cotton. (First Annual Report (1930), p. 25-6).

Congress' next plan to remove the burdensome surpluses which create agricultural low prices and depression was the Agricultural Adjustment Act, whereby producers were paid to undertake a voluntary reduction of production in order to cut down the total supply of cotton which would be ready for movement and sale in interstate commerce. The

Agricultural Adjustment Act was a distinct improvement on the Federal Farm Board, but possessed, as experience showed, limitations of its own. Although reasonably designed to effectuate the purpose of removing obstructions to interstate commerce and promote and foster the orderly marketing of cotton, the voluntary reduction program could raise the price of farm commodities only to a certain extent before certain defects inherent in its structure began to become manifest. As cotton prices went up it paid more and more producers not to cooperate, to forego benefit payments, and, in lieu thereof, to capitalize on the increase in price by expanding their production. Experience in the past has demonstrated that increased prices generally result in an increased acreage being planted to cotton in the ensuing year (Exhibit D-8-B). However forcible the demonstration that the increased prices and the increased value of the cotton crop are due to the concerted cooperative effort of the class of producers to restrict their production, there is always present the selfish temptation to capitalize on an immediate advantage regardless of the ultimate harmful effect produced by oversupplies disrupting the market. The vast majority of cooperating producers see the result of their abstinence frustrated by the minority of non-cooperating producers boosting their individual production and thereby nullifying the efforts of the cooperating producers. This tendency to increase production is accelerated in proportion as the price for cotton becomes more and more favorable, and it can only be met by offering higher and higher payments as inducements to producers to stay out of production. In this way the Agricultural Adjustment Act, at least with respect to cotton, ran afoul the same difficulty that faced the Federal Farm Board, to-wit, that effective elimination of burdensome surpluses from markets that were predominently interstate would have meant the expenditure of exorbitant sums. The Agricultural Adjustment Act was based on the conception that the expenses of the benefit payment program would be covered by receipts from the processing and other taxes levied under the Act; figures indicate that adequately to compensate a producer from refraining to produce additional acreage of twelve-cent cotton(the price for cotton at the time of the enactment of the Bankhead Act) would have cost the equivalent of three years collections in processing taxes on cotton (Agricultural Adjustment in 1934, Report, U. S. Department of Agriculture, page 232). Any further price increases would only have enchanced the inducement which would be necessary to keep producers from turning to the more profitable enterprise of non-cooperation and increased production.

Also, it was not sufficient under the voluntary reduction program to pay an ambitious producer a price for not producing cotton equivalent to the difference between the then current market price and the cost of production of the extra cotton. The producer might have been anticipating a rise in price far above the level which cotton was, at the time of his entering into a cotton reduction contract, selling for. Should the voluntary reduction program attempt to compensate him on the basis of his anticipation of, let us say, a twenty-cent price, it is easy to see what the result in terms of financial expenditure would have been. Cotton producers are not likely to make over-precise estimates as to what cotton will bring and what their cost of operation will be, and it would be financially impracticable to attempt to match the expectation of every

producer as to the price which his crop would bring.

The Bankhead Act was therefore devised as a means of seeing to it that the non-cooperating producer did not profit immoderately by virtue of his non-cooperation, and, what is more important, to insure against the non-cooperating producers jeopardizing the success of the program. The tax is far from being a prohibitive one designed to place the non-cooperative at a total disadvantage as compared with the contracting producer. In fact, figures indicate that the non-cooperator is better off than he would have been if no reduction program were in effect and that he may still be in a position to profit from his increased exertions.

The preceding analysis has been submitted by way of indicating the necessity for the Bankhead Act as a supplement to the voluntary reduction set in motion by the Agricultural Adjustment Act. It assumes that Congress may validly foster and promote interstate commerce by passing legislation regulating the amounts that will flow into interstate commerce and may thereby attempt to sustain the prices of commodities sold in interstate commerce. No great difficulty should be found with such an assumption, for the Supreme Court has given its approval to legislation designed to regulate the prices of commodities sold in interstate markets, even where such regulation involved the regulation of intrastate operations.

That the price at which a commodity is being sold may have a vital influence on interstate commerce in the article is given most forceful expression in the case of Chicago Board of Trade v. Olsen, 262 U.S. 1, sustaining as a legitimate exercise of the interstate commerce power, the Grain Futures Act, legislation designed by Congress to eliminate corners in the grain market and other practices calculated to unduly depress grain prices. The court said(pp. 851-852):

> "If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the States. Sales of an article which affect the countrywide price of the article directly affect the countrywide commerce in it." (Underscoring ours.)

It may likewise be noted that the basic policy of the Sherman Anti-trust Act was the prevention of combinations which, through control of the supply of goods available for interstate commerce, might be in a position to injure the consuming public by exacting unduly high prices. U. S. v. Patten, 226 U. S. 525. In Standard Oil Co. v. United States, 283 U. S. 163, the Supreme Court held the Sherman Act applicable to refineries engaged in the manufacture of gasoline. In doing so, the court indicated the legitimateness of Congress' concern with a factor which, though not itself interstate commerce, fixed the price entering into interstate commerce. At page 169 of its opinion, it said:

> "Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or to fix the price of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act."

These cases indicate that it is a constitutional justification for congressional interference and regulation of trading in grain and cotton futures, and of manufacture, that these activities, although ostensibly intrastate, have an effect upon the price of goods moving and sold in interstate commerce. In the case of cotton, it has been shown that the quantity of cotton produced has been an all-important factor in determining the price of cotton, and that excessive production, like corners in the market and combinations had, at the time of the enactment of remedial legislation like the Agricultural Adjustment Act, unduly depressed prices.

In fact, the point at which the unwholesome effect upon the price of the agricultural commodity manifests itself is the same in the Olsen and in the instant case, i.e., the central market where cotton and grain futures or spots happen to be sold. It is on the basis of central market prices that prices to the producers and consumers of cotton are determined. This central market price is based primarily on an anticipation of what the national supply of cotton will be, and reacts very readily to any indication that the total supply of cotton available is going to be increased or decreased. This central market, with its widespread effect on prices paid both consumer and producer, Congress assumed to regulate in the Olsen case, because of the effect that manipulations in it had on the price of the commodity in interstate commerce. If now Congress attempts to reach further back and strike at another evil which it conceives to be at the basis of undue depressions in commodity prices, what is there to prevent it, particularly if it be argued that a basic cause of the evil sought to be remedied in the Lemke cases is the uncontrolled production which the adjustment program attempts to limit in the instant case? If Congress may attack corners and combinations for their depressing or elevating effect on the prices of commodities in which there is country-wide trade, there is no apparent reason why it should not attempt to discourage bumper crops, since they have the same effect.

We contend that it is not appropriate for this court to question the wisdom of this type of analysis. It is sufficient that here, as in the Olsen case, Congress probed the condition which it deemed to be at the basis of a harmful situation in interstate commerce and undertook to cure it, despite the ostensibly intrastate character of the vicious condition.

That Congress' reaching at an intrastate transaction in attempting to protect the interests of interstate commerce does not invalidate its regulation from the constitutional standpoint is demonstrated not only by the Olsen, Patten, and Standard Oil cases cited above, but by the whole current of cases involving the enforcement of the Sherman Act.

Thus, in Coronado Coal Co. v. United Mine Workers, 268 U.S. 295,

the Sherman Anti-trust Act was held applicable to striking coal miners who were preventing the movement in interstate commerce of approximately 5,000 tons of coal daily in order to prevent the non-union coal from forcing down the price of coal mined by union miners. The striking coal miners in the Coronado case certainly were not regarded as being engaged in interstate commerce. Indeed, in the first Coronado case (United Mine Workers v. Coronado Coal Co., 259 U. S. 344), The Supreme Court, after citing many cases, said at page 408:

> "It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint." (Underscoring supplied.)

Other cases sustaining the application of the Sherman Act to persons who were engaged in purely intrastate activity, which did, however, burden interstate commerce by affecting the price of commodities which moved in interstate commerce, are U. S. v. Patten, 226 U. S. 525 (discussed above); Swift & Co. v. U. S., 196 U. S. 275: Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211; Loewe v. Lawlor, 208 U. S. 274; Bedford Co. v. Stone Cutters Association, 274 U. S. 37; U. S. v. Brims, 272 U. S. 549; Local 167, etc. v. U. S., 291 U. S. 293.

Further argument may be made that the tax imposed by the Bankhead Act restricts the production of some cotton which may never enter the stream of interstate commerce, but be consumed locally. There is ample legal authority for the proposition that the presence of some intrastate movement is not a bar to federal regulation of the total current of commerce, if it be established that the preponderant element in such commerce is interstate. In both Stafford v. Wallace, 258 U. S. 495, sustaining the constitutionality of the Packers and Stockyards Act, and Chicago Board of Trade v. Olsen, supra, the Supreme Court recognized the fact that some quantity of the livestock and grain subject to regulation moved wholly within the state of Illinois and so could not be said to move in interstate commerce. Nevertheless, the quantities moving solely in intrastate commerce were held to be subject to regulation along with the bulk of the interstate commerce, The Supreme Court recognizing the obvious fact that administrative difficulties would be great were it sought to exempt the quantity of the commodity which would be solely intrastate from the regulation. At the moment that cotton is being ginned (and often later) there is no precise guaranty available that the particular cotton involved will or will not move in interstate commerce. To check up on the ultimate movement of this cotton, in view of the quantities which are stored on the farms and of the diverse localities to which the cotton can be consigned, would be administratively impracticable. After cotton is ginned it may be stored at the farm, stored at the gin, shipped to a warehouse for storing there, stored in a compress, et cetera. Not only is its destination a matter of doubt, but the length of time for which it will stay in any one place before moving into interstate commerce is extremely uncertain. In fact it is possible that cotton will be in several intrastate locations before being destined to a source that will irrevocably stamp the specific cotton as being

consumed in intrastate or interstate commerce. The administrative impossibility of determining what is cotton destined for intrastate consumption as opposed to cotton intended for interstate or foreign consumption is, it can be seen, much greater than in either the Stafford or the Olsen cases, and, therefore, the holding of those cases is even more forcefully applicable here.

In considering the correctness of the theory upon which Congress based the Bankhead Act, it must be borne in mind that a court is not entitled to require conclusive demonstration of the theory's correctness as a prerequisite to stamping the legislation a reasonable regulation of interstate commerce. Once the purpose which Congress had in mind is established as valid, the only question remaining is whether the means which Congress adopted can be said to be reasonably adapted to the purpose in question. Whether Congress' analysis of why interstate commerce was obstructed is correct or not is a question for the decision of the legislature, and Congress' conclusions thereon should not be disturbed by the court unless clearly unreasonable. As the Supreme Court said in Northern Securities Co. v. U. S., 193 U. S. 197, with reference to the economic policy embodied in the Sherman Anti-trust Act, (p.337):

> "* * * As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men."

In Stafford v. Wallace, 258 U. S. 495, the court said (P. 521):

> "This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

See also Chicago Board of Trade v. Olsen, 262 U. S. 1.

Accordingly, it is not for the courts to question whether the particular method of relieving interstate commerce from the depression adopted by Congress was the best method available under the circumstances or even a good one. As long as it be established that the method adopted was, at the time of the enactment of the statute not clearly unreasonable, this court is not to substitute its own judgment for the judgment of Congress nor can it do this upon the basis that, while economic theory underlying the Agricultural Adjustment Act and the Bankhead Act was a reasonable inference at the time that Congress passed the statutes, subsequent experience has demonstrated the inadequacy of the Act to effect for interstate commerce what Congress thought it would. This court is not called upon to consider whether the results of administration of the law have verified or disapproved the economic theory upon which it is based. Hegeman Farms Corp. v. Baldwin, 293 U. S. 163.

It is submitted that the correctness of the conclusion of Congress that the reduced purchasing power of the agricultural population in general, and cotton growers in particular, during the depression is in part responsible for the reduction in the general flow of all commodities in interstate commerce, is a matter of judicial knowledge and is also demonstrated by the evidence in this case. The Bankhead Act is therefore justified as an exercise of the commerce power designed to restore the flow of interstate commerce throughout the nation to its normal level by increasing the purchasing power of the cotton growers of the country.

The same deference towards the legislative judgment should be exercised by the courts in considering whether the regulation and administrative scheme which Congress has set up is reasonably calculated to effectuate the purpose which Congress had in mind. In considering the propriety of the tax on ginning as a regulatory device for interstate commerce, several things should be borne in mind. The first is that there is no objection to a regulation of interstate commerce taking the form of a tax. University of Illinois v. U. S., 289 U. S. 48, holding that the Protective Tariff Act of 1922 is an exercise of the power of the federal government to regulate foreign commerce. Compare Edye v. Robertson (Head Money Cases), 112 U. S. 580, Veazie Bank v. Fenno, 8 Wall. 533.

The effect of the tax on ginning may be to bring about a condition which has been demonstrated to be a valid mode of restoring the troubled and interrupted currents of interstate commerce, i.e., the tax may reduce the amount of cotton available for sale on the predominantly interstate cotton market. But the rule that the legislative judgment on such matters should be considered final, should be sufficient to render superfluous any consideration of why the tax was imposed on ginning. Perhaps, however, some attention might be devoted, in clarification of points which have already been set forth, to indicating the administrative desirability of imposing the tax upon ginning rather than having it assume any other form, and the special ways in which a tax on ginning may be said to have a peculiar relevance to the current of interstate commerce.

Certainly, the argument is not tenable that Congress looked forward to a regulation of ginning; this no more describes the aim of the Bankhead Act than the statement, already disposed of, that Congress looked forward to the regulation of production. The choice of ginning as the place at which the tax was to be imposed, arises in some measure from the fact that restriction of the total quantity of cotton to be sold or to be transported in interstate commerce at any point subsequent to ginning would not only be impracticable but useless. The factor which has the unduly depressing effect on prices noted above is the quantity of cotton which is available for sale. Cotton prior to ginning cannot be described as being available for sale and, therefore, if ginners are influenced by the tax to gin lesser quantities, there is to some extent a reduction in the amount which is recognized as being available for sale. Possibly more important than this, the Bankhead tax, being an excise, tends to be passed on to the producer, and since it adds to his cost of production, operates as a deterrent to his increasing production beyond the level

which Congress has deemed necessary to safeguard the prices which producers will obtain and the free flow of commerce. Of course, as has been pointed out, this deterrent is not an absolute one and is not intended to render the operation of the non-cooperating producer's extra business unprofitable, since he is still in a position to profit more from ginning even the cotton subject to tax than he would be had there been no reduction program at all in effect. The effect of the Bankhead Act is merely to prevent the non-cooperating producer from taking temporary advantage of an increase in prices not due to his own efforts to reap an unwarranted profit and in so doing jeopardize the future success of the cotton adjustment program.

That, in the normal order of things, the ginning occurs before the cotton crosses state lines would not, on the basis of the established adjudications of the Supreme Court, remove it from the scope of Congressional regulation. Thus, in Lemke v. Farmers Grain Co., 258 U. S. 50, the Supreme Court held unconstitutional a North Dakota statute regulating the business of purchasing grain from farmers in North Dakota prior to its shipment in interstate commerce outside the state. The statute in question permitted the purchase of grain only by licensed buyers; required the payment of state charges; provided for a system of grading, inspection and weighing, and further fixed the price to be paid for grain purchased by a buyer in the state. Despite the argument of the state that it had merely attempted to regulate commerce in grain before the interstate journey commenced, and, therefore, while such grain was still in intrastate commerce, the court held the statute invalid as an attempt by the state to regulate interstate commerce. The court said:

> "the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement.
>
> "Nor will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce."

The proponents of the legislation further argued that it was in the interests of the grain growers and assential to protect them "from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold". In reply to this contention the court said (p).61):

> "This may be true, but Congress is simply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitituion under federal control."

Thus, in holding invalid the North Dakota statute involved in that case, the Supreme Court expressly stated that sales of a commodity prior to

its movement in interstate commerce are subject to regulation by the Federal Government in the exercise of its Commerce Power.

In Shafer v. Farmers Grain Co., 268 U. S. 180, The Supreme Court, in declaring unconstitutional a North Dakota State statute which regulated the purchase of grain in that state expressly stated that the purchase of a commodity to be transported in interstate commerce by the buyer is itself a part of interstate commerce (p. 198):

> "Buying for shipment, and shipping, to markets in other states when conducted as before shown constitutes interstate commerce -- the buying being as much a part of it as the shipping."

To the same effect is Dahnke-Walker Co. v. Bondurant, 257 U. S. 282.

If sales merely contemplating shipment into interstate commerce are without the scope of state regulation and fall under the paramount power of Congress to regulate interstate commerce, it is not apparent why any different rule should be applied to ginning, which involves the preparation of cotton for its interstate transit.

Hammer v. Dagenhart, 247 U. S. 251 may not, properly, be urged as authority for the constitutional invalidity of the Bankhead Act as a regulation of interstate commerce. The Supreme Court in that case decided that although the act of Congress in question purported to prohibit interstate commerce in the products of child labor, the real purpose and intendment of the Act was "to regulate the hours of labor of children in factories and mines within the States, a purely State authority." The holding, as stated by Mr. Chief Justice Taft in Brooks v. United States, 267 U. S. 432, at 438, was that the Child Labor law was invalid "because it was really not a regulation of interstate commerce but a Congressional attempt to regulate labor in the State of origin, by an embargo on its external trade." In the case of the Bankhead Act a far different situation obtains. The act imposes a tax upon ginning, an operation which vitally concerns the amount of cotton which will move in interstate commerce, with a view to bringing such amounts within limits consistent with what the consumption demand for the cotton will be. This limitation of the amount which will move in interstate commerce, in order to bring production and consumption to more equal levels, is a prerequisite to the state deemed by Congress essential to a resumption of the normal current of interstate commerce, i.e., the raising of prices to farmers to increase their purchasing power. Congress in the Bankhead Act is not interested in any of the conditions of production and does not purport to regulate matters such as child labor which the Supreme Court may consider to be within the province of state regulation. The Bankhead Act is completely devoid of any details indicating any other intent than to prevent excessive supplies of cotton from manifesting themselves as a threat to the interstate market.

Furthermore, nowhere in the case of Hammer v. Dagenhart is there claim or proof of the fact that the employment of child labor affects interstate commerce.

> "Nowhere in the opinions or in the argument of counsel is it suggested that the employment of child labor by the factories has any substantial effect upon interstate commerce in the articles so manufactured. * * * There is no suggestion here that (this) unfair competition (resulting from the employment of child labor in some States) burdened, obstructed or diminished the free flow of interstate commerce in goods of the character involved. Counsel for the Government, after enumerating the economic and social reasons in support of the law summed up their contention by the conclusion that the shipment in interstate commerce of the goods made with the aid of child labor operated to deter other states from enacting laws which they would otherwise enact for the protection of their own children; but counsel did not suggest that the admission to interstate commerce of articles made with the aid of child labor would affect interstate commerce in any degree" (Victor v. Ickes, Sup. Ct. D. C., 61 Wash. L. Rep. 870, 875.)

The Bankhead Act is clearly distinguishable in that it is not open to the objection that it attempts to discriminate against the products of factories or states where inferior working conditions prevail. It does not concern itself with the conduct of any of the persons involved in raising cotton or preparing it for shipment, but directs itself, in the manner which Congress deemed most practicable, to a restriction of the amount of such cotton to be produced and ginned, so that excessive supplies may not have the harmful effect of lowered prices and interferences and stoppages in interstate movements of the type which justified Congressional regulation of commodity exchanges and combinations tending to fix prices in interstate commerce.

Nor can any logical argument be based upon the line of cases whose most recent expressions in the Supreme Court are Minnesota v. Blasius, 290 U. S. 1; Federal Compress Co. v. McLean, 291 U. S. 17; Chassaniol v. Greenwood, 291 U. S. 584. These are all cases involving taxation by the state of transactions having an indirect relation to interstate commerce. They all go to the constitutional validity of state, and not of federal, legislation. The question which the Supreme Court faced in these cases was whether or not the state statute unduly interfered with interstate commerce, and a decision that the state statute in question was not unconstitutional as an interference with the right of Congress to regulate under the commerce clause is not necessarily exclusive of Congress' power subsequently to regulate, under the commerce clause, transactions concerning the same commodity.

In fact, Minnesota v. Blasius contains a direct statement by the Supreme Court that these cases are not to be regarded as outlining the limits of the power of the federal government under the commerce clause. The case involved the right of the State of Minnesota to tax, as personal property, cattle situated in the St. Paul stockyards on a given date. The cattle had been shipped to the yards from a point outside

of Minnesota and were purchased by the defendants from a commission merchant. On the day after the taxable date the cattle were shipped outside of Minnesota. The court found that the vast majority of cattle so handled in the St. Paul stockyards were shipped from states other than Minnesota and passed through the stockyards to other states. In deference to Stafford v. Wallace, 258 U. S. 495, and Tagg Bros. and Moorhead v. United States, 280 U. S. 420, the Minnesota Supreme Court held the tax invalid on the ground that the cattle were in the current of interstate commerce and hence could not be taxed by the state. The United States Supreme Court reversed the Supreme Court of Minnesota and sustained the constitutionality of the tax, pointing out that although the cattle in the stockyards were in the current of interstate commerce and hence subject to regulation by the Federal Government, it did not follow therefrom that the cattle could not be taxed by the State of Minnesota:

> "But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. * * * 'The question' (that is, as to the validity of the state tax) 'it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.'
>
> "* * * Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may set until Congress, if it has paramount authority over the subject, substitutes its own regulation." (underscoring ours).

And in many other cases the Supreme Court has expressly declared that the right of a State to tax or regulate transactions with respect to a commodity is not exclusive of the right of the Federal Government to regulate, under the Commerce Clause, transactions respecting that same commodity. See Stafford v. Wallace, 258 U. S. 495, at page 525; Bacon v. Illinois, 227 U. S. 504, at page 516; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, at Pages 245, 246.

It must be borne in mind, in considering the above cited list of cases, that the power of taxation is one that is necessary for the welfare of the states, and that, in the normal instance, non-discriminatory taxes by the state, of localized transactions or of property which has acquired a temporary local status generally will not impede the execution of a broad national policy. Even regulations under the police power of the states have been upheld in the absence of Congressional legislation covering the field. Therefore, it is to be expected that a tax which will not have the effect of interfering with a scheme of federal regulation will be upheld.

In the case of cotton, indeed, it seems quite likely that a state tax on ginning or ginned cotton, or any other processing of cotton, would not impede the effectuation of the Congressional policy under the reduction program but, if it had any effect at all, would tend to aid it. All of this should be borne in mind when considering the cases of Federal Compress Co. v. McLean, 291 U. S. 17, and Chassaniol v. Greenwood, 291 U. S. 584.

The first mentioned case involved the constitutionality of a state excise tax on the privilege of operating a cotton compress, graduated according to the number of bales of cotton compressed per annum, and a similar tax upon persons operating warehouses, graduated according to the storage capacity of the warehouse. The court in this case decided that the cotton which had come to rest in the appellant's warehouse, there to be stored and compressed, when the warehouse was located in the same state in which the cotton was originally raised, had not yet started its interstate journey, and that therefore the property was not immunized from local taxation by virtue of the fact that it was destined for further movement in interstate commerce. It is of note that the court in this case applies the same rule to property whose interstate journey has been interrupted as it does to property whose interstate journey has not yet started.

> "Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. Coe v. Errol, 116 U. S. 517; Bacon v. Illinois, 227 U. S. 504; General Oil Co. v. Crain, 209 U. S. 211; Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 669; Minnesota v. Blasius, 290 U. S. 1; cf. Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U. S. 134."

This statement of the Supreme Court serves merely to reaffirm the applicability of cases like Stafford v. Wallace. The unconcern as to whether the state tax is imposed at the beginning of interstate transit or in the middle of interstate transit is probably attributable to the fact that in neither event does the imposition of the tax affect the current of interstate commerce. The case in no way argues against the possibility of subsequent Congressional regulation. In fact, from the above quoted statement, it is deducible that the power of the Federal Government to regulate ginning or compressing is in no way determined by the fact that the Federal regulation falls in the first instance upon a commodity which has not begun its interstate journey, or upon an intrastate transaction which constitutes a pause in the interstate journey of the commodity but by the fact that conditions were present in connection with intrastate operations which vitally and harmfully affected the interstate commerce in cotton. The locale of these harmful conditions is immaterial; Congress' only concern is with their elimination, whether such elimination involves the regulation of intrastate transactions, such as sales, trading on the exchanges, or the manufacture of articles, or whether it involves the production or ginning of cotton.

Chassaniol v. Greenwood likewise involved a tax measure, an ordinance of the city of Greenwood, Mississippi, laying a tax upon every

person buying or selling cotton for himself. All of the cotton that the taxpayer dealt with was grown and ginned in Mississippi. The court held the business of buying cotton to be like its warehousing and compressing - to be a transaction in intrastate commerce involving the preparation of cotton for the sale and shipment in interstate and foreign commerce. Hence, persons engaged in performing such functions may be subjected to an occupation tax. However, the court specifically indicates that nothing in the cases of Lemke v. Farmers Grain Co. and Dahnke-Walker Milling Co. v. Bondurant is inconsistent with the conclusion which it has reached. In these two last-mentioned cases, as has been indicated, the state regulation was found to impose a direct burden upon interstate commerce. In the case of the Bankhead Act there is involved the validity of a federal regulation of interstate commerce, predicated upon the finding of Congress that legislation of the character of the Bankhead Cotton Act was needed to protect interstate commerce. The mere fact that such regulation impinges upon a transaction which is intrastate is immaterial in view of the Congressional finding that the intrastate transaction is where the difficulty with the interstate commerce lay. In sum, both Federal Compress Co. v. Mc Lean and Chassaniol v. Greenwood decide, as to the incidence of specific state taxes, that they do not burden interstate commerce. Both cases are completely consistent with the power of Congress to protect interstate commerce, as expressed in the Bankhead Act, and do no more than assert such power to be coexistent with the power of the state to lay a non-discriminatory tax.

POINT IV.

THE BANKHEAD ACT DOES NOT VIOLATE THE FIFTH AMENDMENT.

The plaintiffs contend that the Act and Regulations are so onerous and put the Texas ginners to such an expense as to take their property without due process of law.

At this point there are several relevant comments that may be made with respect to the evidence before the court. The expense incurred in 1934 by the ginners who actually testified before the court was used by them as a measure of the probable expense they will incur in 1935. Everyone of such witnesses was patently and obviously wholly prejudiced against a continuance of the Bankhead Act. 1934 was the first year of experience in the administration of the Act, and it was unavoidable that a great deal of confusion and unnecessary trouble with its incident expense followed the preliminary efforts to accomplish the purposes of the statute. The same difficulties may and probably will be partly or entirely eliminated in 1935, and it was established by credible evidence that the regulations have been simplified and that it will be considerably less burdensome from the point of view of time and labor for the ginners to make use of the forms and returns during the current ginning season.

Under cross-examination the reasonably expectable expenses of ginners for 1935 underwent considerable reduction and even in the

face of the all too-apparent unwillingness of these witnesses to do other than display an extreme ultra-conservatism for their own interests it was brought out that with no delay in the availability of tax-exempt certificates a very considerable part of the 1934 expense will be non-existent in 1935. The injunctive process will, of course, work only in future so that unless the 1934 experience is considered to provide an accurate barometer as to the future the court should limit its consideration to real probabilities of future expenses rather than to rank conjectures made in their own self-interest by witnesses admittedly prejudiced against the statute and desirous of accomplishing its destruction.

The witnesses for the plaintiffs made a great point of the high ratio between the 1934 expenses and their ginning fees for that season. Each one came well-prepared to establish this point, but only a few were willing to concede that the Bankhead costs per bale would be reduced in proportion as their ginnings increased, and not one was prepared to state that his total income was from the complete operations of his gin for 1934 so that a comparison might be made between his expenses attributable to the Bankhead Act and his total gross income. We submit that a comparison between the Bankhead expenditures and ginning fees only is unfair and not an accurate portrayal of the financial expenditures of the operation of ginning.

The lack of uniformity in the claims of the witnesses for the plaintiffs is strikingly shown by a comparison of the testimony of one witness who incurred an expense of $367.42 in ginning 1,024 bales, another ginner whose expenses were $1,453.15 on ginning 1,850 bales, and still another ginner whose expenses aggregated $729.75 on ginning 959 bales. So far as the plaintiff Wallace is concerned he was very dogmatic about his 1934 expenses in that they were all definitely attributable to the Bankhead Act and absolutely necessary. His nephew, a witness called on his behalf, admitted that a part of the 1934 expenses were only partly attributable to the Act and that a considerable part of them probably would be eliminated in 1935 provided there was no delay in the arrival of proper documents in Texas and no further complicating features to the regulations.

Note should be made of the circumstances that these plaintiffs and all of their witnesses are dogmatic in their statements that they are not the taxpayers under the Bankhead Act and that whatever tax is paid is collected by them from the owners of the cotton and by them merely forwarded to the Collector of Internal Revenue. Accordingly, their legal position is that by virtue of their being made the agency for the administration of the statute such expenses as they are put to in that role constitute a taking of their property in violation of the Fifth Amendment. This same argument or contention could just as logically be made by any citizen who is in any similar way affected by a taxing statute; for example, the citizen who must file a return and pay an income tax is obviously put to additional trouble and often considerable expense in preparing a return or having it properly prepared by an accountant or an attorney, or both. Similarly, retail merchants who are charged with the collection of retail sales taxes throughout

the country must of necessity keep extra records and undergo additional expense in collecting, accounting for, and remitting the tax collected. Again, the Federal gasoline tax involves similar results -- in fact, it is difficult to conceive of any taxing statute, whether Federal, state or local, which does not have these unpleasant but entirely essential aspects. We submit that the existence of these administrative vexations is wholly inadequate to justify the interception of the injunctive process upon a contention that the expense involved takes property without due process.

In this state of the evidence and with the Bankhead Act demonstrated to be a valid exercise of the taxing power and a valid regulation of interstate commerce, it is not apparent how the act can be urged to be in contravention of due process. Absent a showing of arbitrariness or capriciousness with respect to an exercise of the taxing power, or a showing of confiscation with respect to an exercise of the interstate commerce power, it seems quite clear that the objection that the Act in question constitutes a violation of due process cannot validly be brought.

With respect to the possibility of an exercise of the taxing power being claimed to be a violation of due process, the Supreme Court, in a very recent case, Magnano Co. v. Hamilton, 292 U. S. 40 (1934), has said (p.44):

> "Second. Except in rare and special instances (citing Brushaber v. Union Pacific R.R. Co., 240 U. S. 1, 24-25; Nichols v. Coolidge, 274 U. S. 531, 542-543; Heiner v. Donnan, 285 U. S. 312, 325-328; Schlesinger v. Wisconsin, 270 U. S. 230, 239-240), the due process clause contained in the Fifth Amendment is not a limitation upon and taxing power conferred upon Congress by the Constitution."

In only three instances has the Supreme Court declared a Federal taxing statute unconstitutional as a violation of the Fifth Amendment. Nichols v. Coolidge, supra; Untermeyer v. Anderson, 276 U. S. 440; Heiner v. Donnan, supra; The first two of these decisions were based on the fact that the statutes involved sought to levy a tax in respect of transactions which had occurred before the enactment of those statutes. In the Heiner case, the court refused to uphold that portion of the Federal Estates Tax which provided that a gift made within two years of the donor's death should be conclusively presumed to be a gift made in contemplation of death. Retroactive operation is in no way contemplated in the instant case, and so it cannot be said that any of the above cases control the case at bar.

In Williams Investment Co. v. United States (Ct. of Cl. 1933), 3 f. Supp. 225, the Court said (p. 235):

> "It is true that it has been held that a taxing act may be so unreasonable and arbitrary as to violate the due process clause of the Fifth Amendment. Nichols v. Coolidge,

247 U. S. 531, 47 S. Ct. Rep. 710, 71 L. ed. 1184, 52 A.L.R. 1081, Untermeyer v. Anderson, 276 U. S. 440, 48 S. Ct. Rep. 353, 72 L. ed. 645, but in both of those cases the unreasonableness did not lie in the lack of equality of the treatment of those clearly within the classification. The invalidity on those cases arose because of the inclusion of the cases based on events which had transpired before the enactments when there could have been no thought of taxation to evade.

"The retroactive feature of the act which undertook to reach property which had completely passed beyond the power and control of the donor before the act was passed was regarded as so palpably arbitrary and unreasonable as to offend against the due process clause of the Fifth Amendment."

A similar conclusion obtains when the due process objection is weighed against the consideration that the Bankhead Act has been shown to be a valid regulation of interstate commerce. In the exercise of the interstate power, Congress has brought about the termination of prior contracts, and the courts have held that the legislature is unembarrassed by subsisting arrangements. Thus, in undertaking to prohibit rebates, abatements, or discriminatory freight rates, Congress has superseded prior contracts, and the courts have upheld the constitutional validity of such an interference. Armour Packing Co. v. United States, 209 U. S. 56 (1908); New York v. United States, 257 U. S. 591 (1922); Lewis, Leonhardt & Co., v. Southern Railway Co., 217 Fed. 321, 324 (C.C.A. 6th, 1914); W. M. Carter Planing Mill Co. v. New Orleans, M. & Co. R. Co., 112 Miss. 148, 72 So. 884 (1916). Contracts providing for free passes must also yield to the statutory provision against receiving "a greater or less or different compensation" for the transportation of persons or property than that specified in the published schedule of rates. Louisville & Nashville R. Co. v. Mottley, 219 U. S. 467 (1911); Louisville & Nashville R. Co. v. Crowe, 160 S. W. 759 (Ky. 1913); Bell v. Kanawaha Traction & Electric Co., 98 S. E. 885 (W. Va. 1919). The Employers' Liability Act superseded prior contractual arrangement inconsistent with its terms. Philadelphia, Baltimore & Wash. R. R. v. Schubert, 224 U. S. 603 (1912). An agreement in restraint of trade, although lawful when made, became illegal on the passage of the Sherman Act. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290 (1897). Prior contracts have also been held subject to the provisions of the Clayton Act. Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398 (C.C.A. 2d, 1916); Elliott Machine Co. v. Center, 227 Fed. 124 (W. D. Mich. 1915).

Furthermore, it must be borne in mind that the Supreme Court, in no case in which it has conceded any legislation to be regulation of interstate commerce, has ventured to hold it unconstitutional as a violation of due process, unless it was shown that, in the specific action brought, the regulation had a confiscatory effect on the objector. There is a vital difference between asserting that a whole class of regulation of interstate commerce is invalid as violative of due process,

and stating that a type of regulation, under specific circumstances, has such an effect on an individual as to deprive him of property without due process. For this court, then, to hold the Bankhead Act unconstitutional as a violation of due process, after demonstrating that it is a regulation of interstate commerce and without any factual showing that in its specific application it has a confiscatory effect, would be totally lacking in precedent.

The due process objection is applicable only in limited circumstances. These circumstances were recently stated in the case of Nebbia v. New York, 291 U. S. 502:

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."

The Bankhead Act is demonstrably uniform in application and not unreasonable, and the connection between it and the end which it seeks to accomplish has been clearly set forth in terms which show the Act to be a valid regulation of interstate commerce. Under such circumstances even were hardship to some individuals to be shown, it would not suffice to render the statute unconstitutional. This has been reasserted in the Supreme Court as recently as in the case of Hegeman Farms Corp. v. Baldwin, decided November 5, 1934, by an undivided court. In the present case there is no convincing evidence, which is not subject to question as being conjectural and prejudiced, that any considerable expense will be visited upon ginners in 1935, but there is evidence that the ginners as a class are receiving higher ginning fees as a result of higher cotton prices; they accordingly have been advantaged by this legislation to a very great extent. There is something contradictory about attacking legislation which has put one's income on a higher level than it would have been in the absence of such legislation, on the ground that it incidentally subjects one to expense and thus tends to reduce the additional income which would be totally lacking without the legislation under attack; especially is this so when the fruition of such a contingency would result in destroying the ends the statute had in mind. These considerations have been dealt with in more detail in the point of this brief devoted to proving that this is a valid regulation of interstate commerce.

As a final consideration of the due process point should be stressed the weight to be given the legislative declaration of emergency in the Bankhead Act, substantiated by factors of which the Supreme Court has frequently taken judicial notice. Atchison, etc. Ry. Co. v. United States, 284 U. S. 248; Appalachian Coals, Inc. v. United States, 288 U. S. 344; Home Building and Loan Association v. Blaisdell, 290 U. S. 398. The existence of an emergency such as beset the cotton industry constitutes a basis for upholding legislation that in less critical times might be considered to have in it the germs of constitutional invalidity. Wilson v. New, 243 U. S. 332; Block v. Hirsch, 256 U. S. 135; Home Building and Loan Association v. Blaindell, 290

U. S. 398. An economic crisis confronting the nation at large requires to some extent that individual opportunities for profit making be subordinated, not so much to the common good, as to the prevention of a common disaster.

The Bankhead Act, being a valid tax measure and a valid regulation of interstate commerce, and being reasonably adapted to meet the critical condition which necessitated that Congress regulate interstate commerce in the manner in which it did, cannot, therefore, be said to be violative of the Fifth Amendment. That some small portion of the plaintiffs' income must be devoted to the expenses of complying with the law, even if established, does not serve to militate against such a conclusion.

POINT V.

THE BANKHEAD ACT DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE POWER TO THE SECRETARY OF AGRICULTURE AND TO THE COMMISSIONER OF INTERNAL REVENUE.

In paragraph 4 of the bill of complaint the plaintiffs set forth their contention that this statute delegates legislative powers to the Secretary of Agriculture and to the Commissioner of Internal Revenue "without first affixing a primary standard for the exercise of the powers delegated" and is therefore in violation of Article I, Section 1 of the Constitution.

They have not enlarged upon this allegation nor have they either in their pleading or in their evidence particularized as to precisely how the authority given to the Secretary and the Commissioner of Internal Revenue constitutes an unlawful delegation of legislative power.

Insofar as the powers given to the Secretary are concerned, the plaintiffs, no doubt, attack Section 3 which requires the Secretary to ascertain the amount of cotton to be tax-exempt for the 1935-36 crop year, Section 4 which provides for the tax, Section 5 which relates to an apportionment of tax-exempt cotton among the several states, counties and producers, Section 7 which provides for allotments of tax-exempt cotton to the farmers of the several counties, and Section 15 which provides for regulations by the Secretary.

The powers of the Commissioner are contained in Sections 12 and 13, the former having to do with regulations and the latter with information returns.

We submit that the statute successfully meets all of the tests heretofore laid down by the Supreme Court in cases having to do with the subject of the delegation of legislative power. It does establish clearly and without any equivocation precisely what the Secretary is to

do and in what circumstances. In fixing the amount of tax-exempt cotton for the 1935-36 crop year he must make a mathematical calculation based upon the available supply of cotton and the probable market requirements. That calculation is based entirely upon statistical data over which he can have no control. With respect to the rate of tax he again must compute mathematically the average price per pound of 7/8" middling spot-cotton on the ten designated spot-cotton markets and by the terms of the statute the rate of tax is 50 percent of this average price. He must apportion among the several cotton-producing states the number of tax-exempt bales and each state's allotment shall be determined mathematically by the ratio of the average number of bales produced in each state during five crop years preceding the passage of the Act to the average number of bales produced in all the states during the same period. Again, the amount allotted to each State must be apportioned to the several counties in that state on the same basis and ratio. After allotment among the counties the total quantity is to be divided among the several producers therein upon the basis of applications setting forth certain mathematical data to serve as a guide for the computation.

In each instance his authority is purely one of mathematical calculation on pre-existing statistics.

Section 4 of the Act specifically requires that every person ginning any cotton subject to tax will make monthly returns to the Collector and that "such returns shall contain such information * * * as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe." Section 12 provides authority to the Commissioner to prescribe regulations relative to the time and manner of applying for, issuing, and destroying bale tags and the method of accounting for receipts from the sale of and for the use of bale tags and "such other regulations" as he shall deem necessary for the enforcement of the taxing provisions of the statute. Section 13 provides for the returns of information respecting data therein clearly and carefully described including other and further information which the Commissioner, with the approval of the Secretary of the Treasury and of the Secretary of Agriculture, shall prescribe as necessary for the proper administration of the tax.

It is difficult to see in these provisions any lack of a statutory standard or guidd such as has been upheld by the Supreme Court in numerous instances.

In Buttfield v. Stranahan, 192 U. S. 470, the Court upheld a statute prohibiting the importation of tea "which is inferior in purity, quality and fitness for consumption in accordance with the standards provided in section 3" and that section gave the Secretary of the Treasury power, upon the recommendation of a board of experts, to fix and establish uniform standards for teas to be imported into the country. The statute also provides that teas inferior to such standards would be within the prohibition of the statute. The court held that this act fixed

> "A primary standard and evolved upon the Secretary of the Treasury the more executive duty to effectuate the legislative policy declared in the Act."

In Hampton Jr. & Co. v. United States, 276 U. S. 394, the court considered the Flexible Tariff Act which authorized the President to increase or decrease tariff duties by as much as 50 percent so as to "equalize the * * * differences in cost of production" at home and abroad. In ascertaining these differences he was required to consider a number of circumstances such as wages, costs of material and other items of costs of production, differences in wholesale selling prices, advantages granted by foreign governments, and advantages or disadvantages in competition. The Supreme Court there held that Congress had laid down a sufficiently "intelligible principle" to avoid the stigma of unlawful delegation.

To the same general effect are Field v. Clark, 143 U. S. 640; United States v. Grimaud, 220 U. S. 506; Mahler v. Eby, 264 U. S. 32; Union Bridge Co. v. United States, 204 U. S. 584; St. Louis and Iron Mountain Ry. v. Taylor, 210 U. S. 281; and United States v. Shreveport Grain & Elevator Co., 287 U. S. 77.

The case of Panama Refining Co. v. Ryan 293 U. S. 388, was the first instance in which the Supreme Court declared an Act of Congress invalid on the ground that it unconstitutionally delegated legislative power. The court there had before it Section 9 (c) of the National Industrial Recovery Act and that section was held invalid on the ground stated, the court basing its holding upon the entire lack in the statute of any criterion to govern the President's course or any statement by Congress of a policy as to the transportation of excess oil or of any requirement that the President ascertain and comply with conditions making this prohibitory action necessary.

> "The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy.

Yet the court specifically stated that

> The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within the prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort, we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.* * * Moreover, the Congress may not only give such authorizations to determine specific facts but may establish primary standards,

> devolving upon others the duty to carry out the declared legislative policy, that is, as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature."

The only other case in which the Supreme Court has declared a statute void upon this ground is Schechter Poultry Corp. et al. v. United States, decided May 27, 1935. In that case the National Recovery Act was held to be an unconstitutional delegation of legislative power to the President for the reason that it failed to supply standards for prescribed rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. The court said:

> "Instead of prescribing rules of conduct, it (section 3 of the Act) authorizes the making of Codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statements of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."

We submit that there can be no logical application of these judicial expressions to the statute before this Court so as to bring the Bankhead Act within the prohibition of these two cases.

We submit, further, that the contentions of the plaintiffs with respect to the invalid breadth and scope of the Regulations of the Commissioner of Internal Revenue are entitled to no serious attention. It should require no argument to establish that the proper administration of a revenue statute necessarily requires attention to a host of administrative details, the use of uniform and prescribed forms and the filing of specific data upon all of which the proper accomplishment of the statutory purpose must be conditioned and grounded. Casual reference to other revenue statutes enacted by Congress and to regulations promulgated thereunder will, without further citations of authority and without further argument, amply support this statement.

POINT VI.

THE BANKHEAD ACT AND THE REGULATIONS ISSUED THEREUNDER ARE ENTITLED TO THE PRESUMPTION OF VALIDITY. THAT PRESUMPTION HAS NOT BEEN OVERCOME BY THE PLAINTIFFS.

The burden of establishing the invalidity of the Act has been assumed by the plaintiffs by their instituting this action. Erie Railway Co. v. Williams, 233 U.S. 685; Mountain Timber Co. v. Washington,

244 U. S. 219; Middleton v. Texas Power Co., 249 U. S. 152. The courts will not declare a statute to be unconstitutional unless such unconstitutionality has been established beyond all reasonable doubt. Adkins v. Childrens Hospital, 261 U. S. 525. In the language of the Supreme Court in Nebbia v. New York, 291 U. S. 502, in which the constitutionality of a New York statute was at issue:

> "Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

We submit that the plaintiffs have not overcome the presumption of validity of the Bankhead Act. We have endeavored to show elsewhere in this brief that the Act is an exercise of the legislative powers of the Congress, both under the power to levy taxes and under the commerce clause, and the only evidence before the court upon which it may be contended that the plaintiffs have sustained their burden is that on account of the alleged excessive and unreasonable expenses in 1934 and the possibility (demonstrated to be largely fallacious) of similar expenses in 1935, the invested capital in their ginning properties is placed in jeopardy and that their funds in meeting the administrative exigencies of the Act and Regulations are taken from them without any hope of recompense or reimbursement and is, therefore, taking of property without due process.

Elsewhere in this brief we have contended and urged that the 1935 expenses to the ginner may reasonably be expected to be reduced to the minimum, which any tax-payer put to a similar burden by a taxing statute must expect to incur in order to permit the proper functioning of an act of Congress.

Also, if there is any conclusive state of facts in existence at the time the Congress passed the Act which would render the Act constitutional, the courts will presume both that such a state of facts existed and that Congress knew of the existence of such facts. Rast v. Van Deman Co., 240 U. S. 342; Hardware Dealers Mutual Fire Insurance Co. v. Glidden, 284 U. S. 151.

Accordingly, we submit that the defendants have successfully not whatever prima facie case may have been established by the plaintiffs in their evidence relating to the 1934 experience and the possibilities for 1935 and that the balance of equities is definitely in favor of the defendants and against the plaintiffs.

POINT VII

THE PLAINTIFFS HAVE FAILED TO SHOW EITHER THAT THEY WILL SUFFER ANY IRREPARABLE INJURY IN 1935 OR THAT THEY LACK AN ADEQUATE REMEDY AT LAW.

A brief consideration of the evidence given to support the contentions of the plaintiffs will, we submit, establish that they have failed to meet the burden placed upon them to show not merely the probability but the inescapability of irreparable injury by a continuance of the Bankhead Act and that for the adequate protection of their rights they require injunctive process and do not have an adequate remedy at law. For the plaintiffs successfully to maintain this action it is essential that they establish these two points and that the proof of such points be not left to conjecture or speculation.

All of the ginners who testified on behalf of the plaintiffs evidenced a definite and fixed prejudice against the statute. The attitude of the witness Thompson, Secretary of the plaintiff Association, was so markedly prejudiced and biased as to draw the attention of the court. Each one of these ginner witnesses presented the worst possible portrayal of the evils visited upon them by the Act and they laid great stress upon their experience with it in the last (1934) ginning season. They endeavored to carry forward into the 1935 ginning season the administrative and financial hardships to which they testified as to the last season but a careful consideration of the evidence will show the fallacy inherent in their testimony.

For example, the plaintiff Wallace states in the amendments to the bill of complaint that his gin is valued at approximately $20,000 and that a continuance of the Act will place that entire property in jeopardy, but his testimony fails to bear out any such extravagant contention. The itemized list of expenses incurred by him and attributed by him to the Bankhead Act totaled in 1934 approximately $781.00.

Plaintiffs' Exhibit 6, which is slightly at variance with the statement appearing in the verified bill of complaint, was testified to by plaintiff Wallace as stating correctly and accurately the 1934 expenses under the Bankhead Act and each one of the items on the statement was attributed by him wholly to the statute, but his own witness, his nephew and regular bookkeeper, admitted under cross-examination that some of the items for 1934 were only attributable in part to the Bankhead Act. The items for insurance, for additional space for the storage of cotton and for a watchman will concededly be eliminated in the current season if the documents necessary to enable the producers to obtain bale tags are available in the field in time for the operation of ginning in the various counties of the state. The witnesses for the defendants testified, without any contradiction, that the administrative regulations have been modified and made less onerous and that all necessary documents for the accomplishment of

the statute are now in the course of preparation and forwarding to the proper officials of the state and would in all probability be available in ample time for prompt use.

The experience of the ginners, the county agents, and the collectors of internal revenue in the 1934 season will obviously facilitate the administrative functions under the statute throughout the entire course of administration of the Act and the regularity of procedure in 1935 with the elimination of any accumulation of untagged cotton will reduce the ginners' trouble and expense to an absolute minimum.

Thus the efforts of the ginner witnesses to prove their right to injunction fails utterly to show free and clear of rank speculation and conjecture as to their absolute expense in 1935 that they are in the slightest danger of suffering what the courts have upheld factually as irreparable injury. In fact, an unprejudiced and unbiased consideration of the evidence and of the experience of these ginners in the current ginning season will leave no room for doubt as to the extravagant nature of their complaints and contentions and their entire lack of any real and actual basis of right to ask for injunction.

As we have urged in another part of this brief, the orderly and the normal procedure for them to follow in their determination to obtain a judicial declaration of the invalidity of the Act would be by suit against the Collector to recover the tax paid. If, perchance, the ginner is not under the statute the taxpayer so as to entitle him to bring such an action and if the duties imposed upon him by the statute in the way of filing a bond, making out returns, keeping custody of bale tags and other documents and accounting for them place him under an excessive and confiscatory financial obligation his proper remedy is obviously to apply to the Congress for compensatory relief and not to endeavor to attack the validity of the statute upon a misconceived notion that although the tax provided for in the act does not affect him financially, the administration of the statute unreasonably depresses him and puts him to unnecessary and unwarranted expense.

We therefore contend and earnestly submit that the plaintiffs have failed to establish their case and to meet their burden of proof, that they are entirely lacking in equity and that they have completely failed to show the absence of any remedy at law which would be quite adequate to protect their legal interests.

POINT VIII.

THE PLAINTIFF WALLACE IS ESTOPPED FROM QUESTIONING THE CONSTITUTIONALITY OF THE BANKHEAD ACT.

The plaintiff Wallace testified that he applied under the Bankhead Cotton Act for tax-exemption certificates. The application recited that he agreed to comply with "the terms of the Act". Relying upon this prom-

ise and the other representations made in the application, the Secretary of Agriculture through his agents had tax-exemption certificates issued to him.

Having thus applied for tax-exemption certificates under the Act and elected to comply with the terms and provisions, he is now estopped from questioning its constitutionality.

In similar situations the courts have held that a litigant is estopped from questioning the constitutionality of a statute, for it is a well settled rule in the Federal Court that one who has voluntarily invoked a statute is estopped later to assert its unconstitutionality. Thus in American Bond and Mortgage Co. v. United States, 52 F. (2d) 318 (C.C.A. 7th, 1929; certiorari denied 285 U. S. 538), the appellants had been engaged in the business of broadcasting before the passage of the Radio Act of 1927, under which the Federal Government assumed a licensing power which considerably restricted and regulated the business of radio broadcasting. Acting pursuant to and under this Act appellants applied for and received a limited license. Subsequently and after the limited license had expired the appellants attempted to obtain a renewal, and upon being refused sought to attack the constitutionality of the Radio Act. The court, however, said:

> "Having sought and secured a Government permit or license with its attendant benefits, appellants obviously cannot later assert rights which were surrendered in order to secure the permit".

In Booth Fisheries Co. v. Industrial Commission, 271 U. S. 208, an employer attacked the constitutionality under the 14th Amendment of the Workman's Compensation Act of Wisconsin. That statute binds only those employers who elect to become subject to it, but if they do not so elect they are deprived of the defenses of assumption of risk and the negligence of a co-employee (see the same case, 185 Wis. 127, 129). The Supreme Court held that the employer voluntarily invoked the Act and therefore could not contest its constitutionality, saying (p. 211):

> "* * the employer in this case having elected to accept provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint."

We accordingly contend that having thus applied for and received such immunities as the statute gives the plaintiff Wallace may not now escape its burdens by asserting that it is unconstitutional. This position is supported by the decision of the Circuit Court of Appeals for the Fifth Circuit, in Moor v. Texas & New Orleans R. R. Co., decided February 13, 1935 (cert. granted May 20, 1935), which concerned the right

of a Texas cotton producer to a mandatory injunction requiring the carrier to transport cotton having no bale tags. The plaintiff based his alleged right on the invalidity of the Bankhead Act. In affirming a decree dismissing the bill the appellate court held, inter alia:

> "It appears from the allegations of appellant's bill that he availed himself of the provisions of the Bankhead Act in order to obtain required bale tags for the part of his cotton grown in 1934 which was exempt from the prescribed tax, and in doing so agreed in writing to comply with the terms of the Act, and with prescribed conditions and limitations on his production of agricultural commodities. No facts alleged or proved showed that the making of that agreement was brought about by coercion or duress to which appellant was subjected. One who invokes provisions of a statute for his own benefit may be denied the right to question its constitutionality. Daniels v. Tearney, 102 U. S. 415, 421; Ross v. Lipscomb, A. S. R. 794; Yarnell v. Hillsboro Packing Co., 70 Fed. (2), 435, 438; 6 R.C.L. 95."

CONCLUSION

We earnestly submit that not only have the plaintiffs entirely failed to prove a case for equitable intervention but that the Bankhead Act has been demonstrated to be in all respects valid and constitutional. Accordingly, the above complaint should be dismissed.

Respectfully submitted,

FRANK J. WIDEMAN,
Assistant Attorney General.

ROBERT N. ANDERSON
Special Assistant to the Attorney General

Seth Thomas
Solicitor, Department of
Agriculture.

H, Stewart McDonald, Jr.
Oliver W. Toll
Office of Solicitor,
Agricultural Adjustment Administration
Division.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

****

D. C. WALLACE, ET AL, Plaintiffs,

VS. No. 152 in Equity

W. A. THOMAS, ET AL, Defendants.

****

BRIEF FOR PLAINTIFFS ON APPLICATION

FOR TEMPORARY INJUNCTION

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BRIEF FOR PLAINTIFFS ON APPLICATION FOR TEMPORARY INJUNCTION

TO THE HONORABLE RANDOLPH BRYANT,
PRESIDING JUDGE:

In compliance with the Court's request, plaintiffs respectfully submit the following statements, authorities, and argument, for the purpose of assisting the Court in arriving at a correct determination of this cause.

Before taking up the cause on its merits, it is deemed proper to consider briefly some of the preliminary questions presented by the Motions to Dismiss Bill of Complaint. Some of the matters thus attempted to be raised may be more logically discussed in connection with the merits of the cause, and will be dealt with accordingly.

Right to Maintain Class Suit

Paragraph 6 of the Motion to Dismiss Bill of Complaint challenges the right of D. C. Wallace to sue in behalf of all other cotton ginners in the State of Texas, who are similarly situated, and paragraph 7 challenges the right of Texas Cotton Ginners Association, a corporation, to sue for and on behalf of its individual members.

D. C. Wallace's Right to Maintain Class Suit

The right of D. C. Wallace to maintain this action as a class suit will first be presented.

Equity Rule 38, 28 U. S. C. A. p. 21, provides:

"RULE 38. REPRESENTATIVE OF CLASS. When the question is one of common or general interest to many persons constituting a class so numerous

as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

Volume 3 Cyclopedia Federal Procedure, pp. 248-251, states the general principles, as follows:

"717. CLASS SUITS; ONE OR MORE FOR ALL MEMBERS OF CLASS.

"Representative members of a class may sue or defend in certain cases without joining all of the other members, but in every case there must be sufficient parties to insure a fair trial of the issues, although some may be omitted. This doctrine of equity, at least as applied to cases where the parties are too numerous all to be conveniently joined, has been carried into a general equity rule. The New Equity Rule 38 provides in terms, that when the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole, all of whom are represented and bound as parties, to a degree at least, although formerly they were not.

"A suit is not a class suit because the complaint, asserting individual rights, invites intervention by others having like individual rights. The class must be composed of those who have rights which are of common or general interest to the members, as distinct from the general public. It would seem that the actual party representative of the class need not be one of them, but may be a corporate association of some of them who represent all. When some of a large number of persons having separate and distinct interests sue for all because they are too numerous to bring before the court, it is <u>essential that there be some common interest or right in them.</u>"

The leading authority on the question of class suits is Smith, et al v. Swormstedt, et al. 14 L. Ed. 942, 16 Howard 288, wherein it is stated:

"The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. (Story's Eq. Pl. secs. 97, 98, 99, 103, 107, 110,

111, 116, 120; 2 Mitf. Pl.,Jer. Ed. 167, 2 Baige, 19; 4 Mylne & Cr., 134, 619; 2 De Gex & Smale, 102, 122).

"Mr. Justice Story, in his valuable treatise on Equity Pleadings, after discussing this subject with his usual research and fullness, arranges the exceptions to the general rule as follows: 1. Where the question is one of a common or gneral interest, and one or more sue or defend for the benefit of the whole. 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; **********

"In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.

"Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being befor the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

"The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them; or if ascertained, from the changes constantly occurring by death or otherwise. **********

"Without pursuing the case further, our conclusion is, that the complainants and those they represent, are entitled to their share of the property in this Book Concern. And the proper decree shall be entered to carrying this decision into effect.

"The complainants represent, not only all the beneficiaries in the division of the Church South, but also the General Conference and the Annual Conferences of the same. The share therefore of this Book Concern belonging to the beneficiaries in that church, and which its authorities are entitled to the safe keeping and charge of, for their benefit, may be properly paid over to the complainants as the authorized agents for this purpose."

Little v. Tanner, 208 F. 605, was a suit by certain merchants for themselves, and all other merchants similarly situated, seeking to restrain certain officials from requiring them to obtain a license to use trading stamps in their businesses, and the Court said:

"The objection to the joinder of the plaintiffs and the uniting of the several causes of action is apparently based on the theory that each plaintiff has a separate, distinct, and independent cause of action against the defendants, and that the several plaintiffs may not join in the same suit or unite their several causes of action in the same bill. Equity Rule 38 (198 Fed. XXI X) provides as follows:

'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole'.

"This case would seem to fall within the spirit and equity of that rule."

Grambling v. Maxwell, 52 F. (2) 256, was a suit by one individual peach grower of South Carolina, suing for himself and all other peach growers of that state, to enjoin the Commissioner of Revenue of North Carolina from enforcing a revenue law of that State requiring a license on each truck used. The suit was sustained as a class suit, and an injunction issued in favor of all such peach growers. The pertinent language of the opinion on this point was as follows:

> "The case is not one, however, involving merely the right of a single taxpayer. It is a class suit instituted in behalf of a large number of peach growers affected by the statute; and we think that it may be maintained in equity for the purpose of avoiding the multiplicity of suits which would otherwise result. Whatever may have been the rule formerly as to the right to maintain a class suit of this character in the federal courts, we think that, since the adoption of the 38th Equity Rule (28 USCA Sec. 723), the right to maintain such a suit cannot be denied. Little v. Tanner, 208 F. 605 (D.C.); Everglades Drainage League v. Broward (D. C.) 253 F. 246, 252; Risley v. City of Utica (C.C.) 173 F. 502, 506. And, if such suit may be maintained, there can be no question but that it is speedier, more efficacious, and more satisfactory for all parties concerned than the institution of a hundred or more actions at law for the recovery of taxes paid under protest. The remedy provided by the statute cannot, therefore, in view of the situation, be deemed an adequate remedy as compared with the suit in equity which eliminates so much useless and cumbersome litigation."

Other authorities deemed to be in point are Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 355, 65 L. Ed. 673; Chew, et al v. First Presbyterian Church, 237 F. 219; United States Smelting Co. v. Hofkin, et al, 245 F. 896; Commodores Point Terminal Co., et al v. Hudnall, et al, 283 F. 150; Carnahan, et al v. Peabody, et al, 31 F. (2) 311; Associated Press v. KVOS, Inc., 9 F. Supp. 279; Acken v. New York Title & Mortgage Co., 9 F. Supp. 521.

Briefly applying the principles announced in the foregoing decisions to the facts in the instant case, it will readily be seen that the sole purpose of this suit is to test the constitutionality of the Bankhead Act, and to seek to relieve the cotton ginners of Texas from the oppressive burdens imposed upon them by such Act, and the rules and regulations promulgated in connection therewith. That the plaintiff, D. C. Wallace, is a fair representative of the class is easily demonstrated. He is but one of a particular class of citizens of the State of Texas who are all affected in identically the same manner by this Act. Every cotton ginner in the State of Texas, before being allowed to pursue his occupation as such, must execute the same character of bond that plaintiff, D. C. Wallace, will be required to execute; must make the same character of applications for bale tags, tagging certificates, and lien cards that D. C. Wallace makes; must keep the same character of records that D. C. Wallace must keep; must make the same character of monthly returns that D. C. Wallace

must make; must tag the cotton ginned by him with bale tags or lien cards in the same identical manner; must collect from his customers and pay over to the Collector of Internal Revenue the same character of tax, if any, as D. C. Wallace; and must carry out each and every regulation now in force, or hereafter promulgated, in exactly the same manner as does D. C. Wallace. The foregoing applies only to a particular class, namely cotton ginners, and it applies to every cotton ginner in the State of Texas. Hence, they certainly have a common interest in the subject matter of this suit, namely a judicial determination of the constitutionality of the Act, and the relief sought from its enforcement.

That the cotton ginners of Texas constitute a class so numerous that it would be impracticable, if not impossible, to make them all parties plaintiff is self evident.

That every cotton ginner in the State of Texas will be bound by the final decision in this cause cannot be questioned.

It is respectfully submitted that D. C. Wallace meets every requirement pronounced for the maintenance of a class suit under Equity Rule 38, and that the cause is properly brought as such.

Texas Cotton Ginners Association's Right to Maintain Suit for its Members

Necessarily, all that has been said above with regard to the right of D. C. Wallace to maintain a class suit would be applicable to the plaintiff, Texas Cotton Ginners Association. It but remains to demonstrate that a corporation of the character of this plaintiff can maintain such a suit for and on behalf of its members.

International News Service v. Associated Press, 248 U. S. 215, 63 L. Ed. 211.

> "The Associated Press, which was complainant in the district court, is a cooperative organization, incorporated under the Membership Corporations Law of the State of New York, its members being individuals who are either proprietors or representatives of about 950 daily newspapers published in all parts of the United States. ***** Complainant gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers, and distributes it daily to its members for publication in their newspapers. The cost of the

service, amounting approximately to $3,500.00 per annum, is assessed upon the members and becomes a part of their costs of operation, to be recouped, presumably with profit, through the publication of their several newspapers. **********

"The bill was filed to restrain the pirating of complainant's news by defendant in three ways: First, by bribing employees of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers. **********

"A preliminary objection to the form in which the suit is brought may be disposed of at the outset. It is said that the circuit court of appeals granted relief upon considerations applicable to particular members of the Associated Press, and that this was erroneous because the suit was brought by complainant as a corporate entity, and not by its members; the argument being that their interests cannot be protected in this proceeding any more than the individual rights of a stockholder can be enforced in an action brought by the corporation. From the averments of the bill, however, it is plain that the suit in substance was brought for the benefit of complainant's members, and that they would be proper parties, and, except for their numbers, perhaps necessary parties. Complainant is a proper party to conduct the suit as representing their interest; and since no specific objection, based upon the want of parties, appears to have beenn made below, we will treat the objection as waived. See Equity Rule 38, 43, 44."

Merchants & Manufacturers' Traffic Ass'n. of Sacramento v. United States, 231 F. 202. The facts briefly stated are:

This is a suit by the Merchants' and Manufacturers' Traffic Association and others.

"The petitioners are applying to this court, upon the bill of complaint and affidavits, for an interlocutory injunction to restrain in part an order of the Interstate Commerce Commission, dated April 30, 1915, and the tariff filed by certain of the transcontinental rail carriers pursuant to said order (Supplement 16 to Transcontinental Freight Bureau West-Bound Tariff No. 1-N), in so far as the said order charges for west-bound transcontinental commodities destined to Sacramento, Stockton, San Jose, and Santa Clara any greater amount than is charged for the transportation of like commodities to San Francisco or Oakland."

The Court held:

"The purpose of these statutes is plainly to meet a situation and bring in all parties interested in the controversy, to the end that the entire question involved may be settled and determined in the one proceeding. Such being the purpose, we see no objection to <u>classes of persons similarly situated</u> being represented by an association or other organization and coming into the controversy under the common name. This, we think, brings this case within the well known rule that bills may be filed in the name of an unincorporated association and by parties on behalf of others similarly situated. In Foster's Federal Practice (5th Ed.) Sec. 114, the rule is stated as follows:

"'Class Suits. When a number of persons have a common interest in a thing which is the subject of litigation, and in some instances when a number of persons have a common interest in a question which is before the court for decision, one or more may sue or be sued in behalf of the rest. Judge Story divides the first of these divisions into two: '(1) When the question is one of a common and general interest, and one or more sue or defend for the benefit of the whole; and (2) when the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole.' But there seems to be no reason for treating the two classes separately. They are called 'class suits', 'creditors' suits', or 'stockholders' suits', as the case may be.'

"Moreover, the equity rule seems to contemplate such a suit for the common benefit of all where the parties are numerous and have a common or general

interest. Equity Rule No. 37 (198 Fed. xxviii, 115 C. C. A. xxviii) provides:

'All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and persons having a united interest must be joined on the same side as plaintiffs or defendants.'

"Equity Rule No. 38 (198 Fed. xxix, 115 C. C. A. xxix) provides that:

'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.'

"We think under these rules this action may be maintained by the petitioners. The motion to dismiss is therefore denied."

Everglades Drainage League, et al v. Broward Drainage District, et al, 253 F. 246.

This bill was filed by the Everglades Drainage League, a voluntary association having more than 1000 members, owning lands in the Everglades Drainage District, a Florida corporation, for themselves and all others in like interest. Plaintiff sought an injunction against the Florida Uniform acreage tax of 25 cents per acre imposed by the Board of Drainage Commissioners, and asked that the tax be held void and the Act declared unconstitutional. A motion to dismiss was filed attacking the right of plaintiff to maintain the suit, but such motion was denied.

Associated Press v. KVOS, Inc., 9 F. Supp. 279.

This suit was instituted by the Associated Press, on behalf of its newspaper members, to restrain the defendant from broadcasting news items. No other plaintiff was named, and its right to maintain the suit was assailed by motion to dismiss the bill.

The Court held:

"The question raised, also, in the motion to dismiss that there is a defect of parties complainant, in that the Bellingham Herald was not joined, must likewise be resolved against defendant, upon the authority of Federal Equity Rule 38 (28 USCA Sec. 723, Hopkins (6th Ed.) p. 226, which provides: 'When the question is one

> of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole', and upon the authority of Merchants' & Manufacturers' Traffic Ass'n. v. U. S. (D. C.) 231 F. 292, 294, where the court said: 'We see no objection to classes of persons similarly situated being represented by an association or other organization and coming into the controversy under the common name. This, we thing brings this case within the well known rule that bills may be filed in the name of an unicorporated association, and by parties on behalf of others similarly situated,' and in view of the further fact that it is alleged in complainant's bill (paragraph 5, p. 2) 'that complainant has more than 1200 members, each owning or representing a daily newspaper in the United States', and as stated elsewhere in the bill in effect that those members are similarly situated."

Applying the foregoing cases to the facts of this case, it appears, both from the verified bill of complaint and the proof offered in support of same, that this plaintiff is a voluntary, cooperative corporation, organized without capital stock, and operating without profit. That its primary purpose is to promote the best interests of its individual members. That it has in excess of 1800 individual members, and its principal source of revenue is from annual dues paid by such members. That it is operated by a board of directors, who in turn have appointed an executive committee to act for the Association. That in the annual convention held in Dallas, Texas, in April, 1935, a majority of the individual members directed the executive committee to take such action as that body saw fit to undertake to relieve the individual members from the burdens imposed by the Bankhead Act, and pledged their moral and financial support to any action taken. That in a special called meeting of the Executive Committee, held in Dallas, Texas, in May 1935, a resolution was unanimously adopted authorizing the employment of the attorneys who are representing the plaintiffs herein, and directing such attorneys to bring this suit. That the expenses of prosecuting this suit are being paid by the individual members of the Association.

It is submitted that the averments of the bill of complaint make it plain that the suit is brought for the benefit of the individual members, that such individual members would clearly be proper parties plaintiff, but that their number makes it impracticable to name them as parties plaintiff. That this complainant is the proper party to represent their interests, and, under Equity Rule 38 and the principles announced in the foregoing decisions, is entitled to maintain this action as a class suit.

Before leaving this question, it might be well to briefly refer to the three cases cited by defendants' counsel in the oral argument before the Court on the preliminary hearing.

The first case was that of Georgetown v. The Alexandria Canal Company, et al, 12 Peters 91, 9 L. Ed. 1012. In that case the corporate town of Georgetown, acting through its proper officers, brought the suit to abate a public nuisance alleged to have been caused by the canal company. The corporation had not been damaged, but sought to maintain the action in behalf of its individual citizens. The Court merely held that there was no showing that the corporation, as such, had any authority to bring an action on behalf of its individual citizens, and hence the action could not be maintained.

It is respectfully submitted that a very different relationship exists between an incorporated town and its individual citizens, from that which is shown, by both the pleadings and the proof, to exist between Texas Cotton Ginners Association and its individual members. This Court will take judicial knowledge of the fact that a corporate town has many useful purposes to serve, but does not have authority to bring actions for property damage to its individual citizens. On the other hand, this complainant is organized for the express purpose of promoting the best interests of its individual members. No better way to accomplish this corporate purpose can be conceived, than to attempt to strike down what is believed to be an unconstitutional act which threatens to destroy the right of each individual member to pursue the otherwise lawful occupation of a cotton ginner. It further expressly appears that, through proper channels, such individual members had authorized the bringing of this action, and are behind it with both their moral and financial aid.

Even in that very case it is said:

> "There are indeed cases in which it is competent for some persons to come into a court of equity, as plaintiffs for themselves and others having similar interests; such is the familiar example of what is called a creditors' bill. But in that, and all other cases of a like kind, the persons who by name bring the suit and constitute the parties on the record, have themselves an interest in the subject matter, which enables them to sue, and the others are treated as a kind of co-plaintiffs with those named; but in this case it has been already said that the appellants have no such interest as enables them to sue in their own name, and consequently the whole analogy fails."

In the instant case it is perfectly clear that the plaintiff, D. C. Wallace, and every cotton ginner in the State of Texas, has a direct personal interest in the subject matter of this suit, and can maintain same. Hence the Georgetown case is authority for, and not against, the right of D. C. Wallace to maintain this action as a class suit.

While the Texas Cotton Ginners Association, as such, does not gin cotton and could not be compelled to comply with the Bankhead Act, since the primary purpose for which such corporation was created is to promote the interests and welfare of its individual members, it seems equally clear that such corporation does have such a direct interest in the subject matter of this suit that, when properly authorized by its individual members, it could maintain the action in their behalf.

The next authority cited was that of Scott v. Donald, 165 U. S. 108, 41 L. Ed. 648. This action was instituted by one individual importer seeking to enjoin certain peace officers of the State of South Carolina from confiscating liquors which he desired to import, upon the theory that the law, under which such officers were acting, was unconstitutional. He sought to maintain the suit on behalf of all other persons who might import liquors from other states, or foreign countries, for their own use and consumption. It will thus be seen that the persons sought to be included by plaintiff in that case did not include a well defined class, such as cotton ginners, but would include any person in the State of South Carolina who might import one bottle, or hundreds of cases. It will also be seen that the law sought to be tested did not apply with identical force and effect to a well defined class of persons, as does the Bankhead Act. Persons might, or might not, import liquors, and if they did import same, they would, of course, import different kinds and classes of liquors, from different sources, and in varying amounts, and under different facts and circumstances. Under the law itself, each particular case would present a distinct situation, and there could not be present the situation here presented. In the Bankhead Act cotton ginners are specifically mentioned as a class, and the provisions of the Act are identical with reference to each and every ginner in the State of Texas, and every such ginner is affected to the same degree. The common interest in the subject matter of the suit which is essential to the prosecution of a class suit was wholly lacking in Scott v. Donald, supra, but is clearly present in the instant case.

The third case cited was that of Matthews v. Rodgers, 284 U. S. 521, 76 L. Ed. 447, seeking to enjoin the collection of a state tax upon the theory that it constituted a burden upon interstate commerce. The law, in its operation, was not confined to any one well defined

class of persons, such as cotton ginners, and did not purport to operate with regard to such class in a uniform manner. Whether a given person was, or was not, engaged in interstate commerce, to what extent he was so engaged, the applicability of the law, and kindred questions, would necessarily vary in each particular case. A decision in the Matthews case would not be binding upon any other person, or class of persons. As tersely observed by the Court:

> "While the present bill sets up that the single issue of constitutionality of the taxing statute is involved, the alleged unconstitutionality depends upon the application of the statute to each of the appellees, and its effect upon his business, which is alleged to be interstate commerce. The bill thus tenders separate issues of law and fact as to each appellee, the nature of his business and the manner and extent to which the tax imposes a burden on interstate commerce. The determination of these issues as to any one taxpayer would not determine them as to any other. There was thus a failure of such identity of parties and issues as would support the jurisdiction in equity."

It is believed that the above quotation makes self evident the distinction between that case and the present situation, and that a further elaboration thereon is not necessary.

It is earnestly urged that the authorities relied upon by defendants are easily distinguishable, and afford no reason for denying the right of each of the plaintiffs herein to maintain the present action as a class suit.

Court's Jurisdiction Over Defendants Other Than S. D. Bennett

By paragraph 11 of one of the Motions to Dismiss Bill of Complaint the question is riased that this Court does not have jurisdiction over the defendants, other than S. D. Bennett, for the reason that they do not reside in the Eastern District of Texas, and no sufficient cause of action is stated against S. D. Bennett.

28 U. S. C. A. Sec. 113 provides:

> "Suits in States containing more than one district. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against

> the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ issued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."

Third Nat. Bank v. Harrison, et al, 8 F. 721.

Under the statute relied upon here a citizen of another district of the same state was held to be within the jurisdiction of the Court.

Bank of Commerce & Trust Co. v. McArthur, 248 F. 138.

> "CALL, District Judge. In this case D. W. McArthur and W. E. Bell entered a special appearance and motion to quash the subpoena and service; they being residents of the Northern District of Florida and the suit pending in the Southern District. Other defendants reside in the Southern district, and, even though the suit was not of a local nature, it might be maintained in this district, under section 52 of the Judicial Code."

Philadelphia Co. v. Stimpson, 223 U. S. 605; 56 L. Ed. 570.

In this case it was held the Court, having jurisdiction of the person of the defendant, could enjoin his acts though the land in question lay outside the district.

Hatch v. Hall, 22 F. 438.

> "The citizenship of an infringer within the district where the suit is brought, gives the right to proceed in such district against him personally to prevent infringement elsewhere."

Marshall v. Turnbull, 32 F. 124.

> "A defendant, properly served, may be enjoined from committing waste upon, or otherwise impairing the value, of, property in which the complainant is interested, even though the property is located abroad, provided a case for the interposition of a court of equity is made out."

Northern Indiana Pub. Ser. Co. v. Pub. Ser. Comm. of Indiana, 1 F. Supp. 296.

"The members of the Commission are proper parties. Being proper parties and one of them residing in the district, this Court, under Section 52 of the Judicial Code (28 U. S. C. A. Sec. 113), has jurisdiction. The motion to dismiss for lack of jurisdiction and to quash the issuance and service of the subpoena should be and is denied."

Camp v. Gress, 250 U. S. 315, 63 L. Ed. 997.

"On the other hand, Sec. 52 of the Judicial Code makes it clear that the construction contended for by the defendant is unsound. It provides that where a state contains more than one district a suit (not of a local nature) against a single defendant must be brought in the district where he resides; 'but if there are two or more defendants, residing in different districts of the state, it may be brought in either district.' We thus have an express declaration by Congress that, under one particular set of circumstances, a co-defendant may be sued in a district in which he does not reside. Expressio unius est exclusio alterius. This section follows directly after that which contains the general prohibition against suing a defendant in a district other than that in which he or the plaintiff resides, and constitutes one of the specified exceptions to the general prohibition. It shows, therefore, that the prohibition of Section 51 expresses the deliberate purpose of Congress that a person shall not be compelled to submit to suit in the Federal district court in a state within which neither he nor the plaintiff resides, although a co-defendant may reside therein. The history of Sec. 52 confirms this conclusion. It is substantially a re-enactment of Sec. 740 of the Revised Statutes. After the passage of the Act of 1887-1888, restricting the jurisdiction of the Federal courts, considerable doubt arose as to whether the provisions of that act now contained in Sec. 51 of the Judicial Code did not repeal Sec. 740 of the Revised Statutes (Comp. Stat. 1916, Sec. 1034). Compare Petri v. F. E. Creelman Lumber Co., 199 U. S. 487, 50 L. Ed. 281, 26 Sup. Ct. Rep. 133. Congress re-enacted in the Judicial Code this provision expressly permitting, in states having more than one district, all defendants resident within the state to be sued in any district thereof in which one of them resides; while it made no similar provision for the case where the several defendants reside in different states. If Congress, in re-enacting the provisions of Sec. 51, had intended that it should establish a rule with reference to defendants resident in different states, contrary to the construction placed by the overwhelming weight of authority upon the identical provision contained in the earlier statute, it would have expressed that intention in unmistakable language."

Skagit County v. Northern Pac. Ry. Co., 61 F. (2) 638.

> "If it be granted, as we have held, upon the authority of Wilson v. Illinois Southern R. Co., supra, that it is proper to join the counties in an action brought to enjoin the collection of taxes, the objections of the appellants to the jurisdiction of the District Court over the counties outside the district are met, for such an action is controlled by sections 52 and 53 of the Judicial Code (28 USCA Secs. 113, 114), which permit a suit to be brought in a district containing the residence of one of the defendants, where the action is joint and the suit is not of a local nature, and if it be considered that the action is of a local nature because of the fact that the appellees seek to remove the cloud upon real estate lying partly in one district and partly within another in the same state, then the action can be brought in either district under the provisions of section 55 of the Judicial Code (28 USCA Sec. 116)."

S. D. Bennett, being a resident of the Eastern District, and being a proper party to the suit, since this suit is clearly not of a local nature, this Court has obtained jurisdiction over the persons of all the other defendants under the above quoted statute. The relief prayed for seeks the protection of persons, who are members of the class represented herein, and who reside in all four of the Federal judicial districts. Having acquired jurisdiction of the persons of all the defendants, if a proper case for the interposition of the equity powers of this Court is disclosed, the injunction should be granted as against all defendants in order to give efficacy to the decree entered herein.

That the bill of complaint, and the evidence thereunder, shows a cause of action against S. D. Bennett, so that he is both a proper and necessary party, will be fully discussed later in this brief.

Jurisdictional Amount

By paragraph 9 of the Motion to Dismiss Bill of Complaint the jurisdiction of this Court is challenged upon the ground that no sufficient jurisdictional amount is stated.

The Bankhead Act purports to be an act providing for internal revenue.

Under 28 U. S. C. A., Sec. 41 (5) it is provided that the Federal District Court shall have jurisdiction of such suits irrespective of amount.

In Accardo v. Fontenot, 269 F. 447, while Judge Foster was on the District bench in Louisiana, he said:

> "The Court has jurisdiction of all suits arising under the revenue laws, regardless of amount. Judicial Code, Sec. 24, Par. 5 (Comp. St. Sec. 991 (5); Downes v. Bidwell, 182 U. S. 224, 21 Sup. Ct. 770, 45 L. Ed. 1088. A suit arises under a law of the United States whenever its correct solution depends on the construction of that law, and the right set up by a party may be defeated by one construction or sustained by the other. Gold Washing & Water Co., v. Keyes, 96 U. S. 199, 24 L. Ed. 656."

The Circuit Court for the Fifth Circuit affirmed Judge Foster's decision in Fontenot v. Accardo, 278 F. 871.

Downes v. Bidwell, 182 U. S. 224, 45 L. Ed. 1088.

> "The exception to the jurisdiction of the court is not well taken. By Rev. Stat. Sec. 629, subd. 4, the circuit courts are vested with jurisdiction 'of all suits at law or in equity arising under any act providing for revenue from imports or tonnage', irrespective of the amount involved. This section should be construed in connection with Sec. 643, which provides for the removal from state courts to circuit courts of the United States of suits against revenue officers 'on account of any act done under color of his office, or of any such (revenue) law, or on account of any right, title, or authority claimed by such officer or other person under any such law'. Both these sections are taken from the act of March 2, 1833, (4 Stat. at L. 632, chap. 57) commonly known as the force bill, and are evidently intended to include all actions against customs officers acting under color of their office. While, as we have held in De Lima v. Bidwell, 182 U. S. I, ante, 1041, 21 Sup. Ct. Rep. 743, actions against the collector to recover back duties assessed upon nonimportable property are not 'customs cases' in the sense of the administrative act, they are, nevertheless, actions arising under an act to provide for a revenue from imports, in the sense of Sec. 629, since they are for acts done by a collector under color of his office. This subdivision of Sec. 629 was not repealed by the jurisdictional act of 1875, or the subsequent act of August 13, 1888, since these acts were 'not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases and over particular subjects.' United States v. Mooney, 116 U. S. 104, 107, 29 L. Ed. 550, 552, 6 Sup.Ct. Rep. 304, 306.

See also Merchants' Ins. Co. v. Ritchie, 5 Wall, 541, 18 L. Ed. 540; Philadelphia v. The Collector, 5 Wall. 720, sub nom. Philadelphia v. Diehl, 18 L. Ed. 614; Hornthall v. The Collector, 9 Wall, 560, sub nom. Hornthall v. Keary, 19 L. Ed. 560. As the case 'involves the construction or application of the Constitution' as well as the constitutionality of a law of the United States, the writ of error was properly sued out from this court."

Based upon the foregoing statute, and the above authorities, it is here urged that this Honorable Court has jurisdiction of this suit irrespective of the amount involved.

Another grounds of jurisdiction is asserted upon the basis of more than $3,000.00 being involved as appears from the face of the bill of complaint.

Where an injunction is sought the value of the right which plaintiff thus seeks to protect determines the jurisdictional amount, as held in Packard v. Benton, 264 U. S. 140; 68 L. Ed. 596, where it is said:

"Mr. Justice Sutherland delivered the opinion of the Court:

"This is a suit to enjoin the enforcement of a statute of New York (Laws 1922, Chap. 612, p. 1566) alleged to be in contravention of the equal protection of the laws and due process clauses of the 14th Amendment. The statute requires every person, etc., engaged in the business of carrying passengers for hire in any motor vehicle, except street cars and motor vehicles subject to the Public Service Commission Law, upon any public street in a city of the first class, to file with the state tax commission, either a personal bond with sureties, a corporate surety bond, or a policy of insurance in a solvent and responsible company in the sum of $2,500, conditioned for the payment of any judgment recovered against such person, etc., for death or injury caused in the operation of (by) the defective construction of such motor vehicle. The bill alleges that the rate of premium for the required policy is fixed by the insurance companies at $960.00; that the net income from the operation of a motor vehicle is about $35.00 a week, which would be reduced by the operation of the law to $16.50 per week, resulting in confiscation of the earnings of appellant for the benefit of the insurance companies. The statute makes it a misdemeanor to operate such motor vehicles without having furnished the required bond or policy; and appellant avers that appellees,

as prosecuting officers of the state, have threatened, and if not enjoined, will proceed, to prosecute him, unless he complies with the law. The court below was constituted of three judges, under Sec. 266 of the Judicial Code. Upon the return of the order to show cause a hearing was had, and the court denied a motion for an injunction pendente lite, and dismissed the bill for want of equity, without handing down an opinion.

"1. Appellees insist that the district court was without jurisdiction because the matter in controversy does not exceed the value of $3,000. Judicial Code, Sec. 24, Subd. 1. The bill discloses that the enforcement of the statute, sought to be enjoined, will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311; Texas & P. R. Co. v. Kuteman, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547, 552; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65, 73; Scott v. Donald, 165 U. S. 107, 114, 41 L. Ed. 648, 653, 17 Sup. Ct. Rep. 262; Hutchinson v. Beckham, 55 C. C. A. 333, 118 Fed. 399;402; Evenson v. Spaulding, (L. R. A. (n.s.) 904, 82 C. C. A. 263, 150 Fed. 517, 520; Hunt v. New York Cotton Exch., 205 U. S. 322, 336, 51 L. Ed. 821, 27 Sup. Ct. Rep. 529.

"Counter affidavits were filed, tending to show that the expenses incident to compliance with the statute would be less than alleged; but it sufficiently appears that the value of the right of appellant to carry on his business, freed from the restraint of the statute, exceeds the jurisdictional amount."

Other authorities to the same effect are Berryman v. Board of Trustees, 222 U. S. 334, 56 L. Ed. 225; Glenwood Light & Water Co. v. Mutual Light, Heat and Power Co., 239 U. S. 121, 60 L. Ed. 174; American Smelting & Refining Co., et al v. Godfrey, et al, 158 F. 225; Bureau of National Literature v. Sells, 211 F. 379; City of Lee's Summit, et al v. Jewel Tea Co., 217 F. 965.

The right here asserted by the plaintiff, D. C. Wallace, is to be permitted to carry on his lawful occupation as a cotton ginner freed from the burdens sought to be imposed upon such occupation by the Bankhead Act. It is alleged that his gin plant is of the value of $20,000.00 that he received approximately $7,000.00 in gross ginning fees for 1934, and will receive that much, or more, in 1935 if permitted the relief asked for herein. It is further alleged that the effect of the Bankhead Act will be to deprive him of his means of livelihood, and to virtually confiscate his gin plant. That the right here sought to be protected involves more than $3,000.00, exclusive of interest and costs, cannot be successfully disputed, and this Court unquestionably has jurisdiction.

Is this Suit Prohibited by Section 3224, United States Revised Statutes?

By paragraph 3 of the Motion to Dismiss it is claimed that this suit is prohibited by Section 3224 of the Revised Statutes of the United States.

Hill v. Wallace, 259 U. S. 44, 66 L. Ed.822.

"A further question arises as to whether this is a suit for an injunction against the collection of the tax, in violation of Sec. 3224, Rev. Stat. Comp. Stat. Sec. 5947, 3 Fed. Stat. Anno. 2d ed. p. 1032, in so far as it seeks relief against the district attorney and collector of internal revenue. Were this a state act, injunction would certainly issue against such officers, under the decisions in Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (n.s.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Case 764; Ohio Tax Cases, 232 U. S. 576, 687, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372; McFarland v. American Sugar Ref. Co., 241 U. S. 79, 82, 60 L. ed. 899, 902, 36 Sup. Ct. Rep. 498. Does Sec. 3224, Rev. Stat., prevent the application of similar principles to a Federal taxing act? It has been held by this court in Dodge v. Brady, 240 U. S. 122, 126, 60 L. ed. 560, 562, 36 Sup. Ct. Rep. 277, that Sec. 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances makes its provisions inapplicable. See also Dodge v. Osborn, 240 U. S. 118, 122, 60 L. ed. 557, 560, 36 Sup. Ct. Rep. 275. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange,

> and then sue to receive it back, would necessitate a multiplicity of suits, and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market, in order to test the validity of the act, would stop its 1,600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make Sec. 3224 inapplicable."

The same rule is recognized in Pollock v. Farmers Loan and Trust Co., 157 U. S. 429, 39 L. Ed. 759, and Brushaber v. Union Pacific Railroad Co., 240 U. S. 1, 60 L. Ed. 493.

Likewise in Miller v. Standard Nut Margarine Co., 284 U. S. 498, 76 L. Ed. 422, it is said:

> "And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax, there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector."

Likewise in Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 1061, it is held that where a purported tax is in reality a penalty its collection may be enjoined.

Also, in Regal Drug Corporation, v. Wardell, 260 U. S. 386, 67 L. Ed. 318, it is held that Sec. 3224 has no application where the purported tax is in reality a penalty.

In the instant case it is alleged, and amply supported by the evidence, that the real purpose of the Bankhead Act is to control the production of cotton by imposing a penalty in the nature of a prohibitive tax on the amount of cotton produced over and above the amount allotted. This will be more fully treated later in this brief, but for the present it is deemed sufficient to say that the allogations of the bill, <u>which must be taken as admitted on a motion to dismiss</u>, and the proof offered, are amply sufficient to take this case out from under the ban of Section 3224.

It is further respectfully asserted that these plaintiffs are not seeking to enjoin the collection of a tax. On the contrary, it affirmatively appears that they are not only required to pay the purported tax, but by the Act, and the rules and regulations, are required, without remuneration, to incur heavy duties and expenses to collect

it from the producer and pay over to the Government. It is relief from these burdens that the plaintiffs are seeking.

That these plaintiffs bring themselves squarely within the exception stated in Hill v. Wallace, supra, is equally apparent. They are confronted with one of three situations, namely (1) submit to the Act and incur the burdens and expenses without any hope of remuneration, (2) refuse to comply with the Act and forego their constitutional right to pursue the lawful occupation of ginning cotton, thereby having their plants confiscated and being deprived of earning an honest living, or (3) wilfully violate the Act and incur the fines and penalties thereby imposed, if they can find any farmers willing to do business with them.

It is most earnestly urged that for the foregoing reasons Section 3224 has no application to this case.

Is This a Suit Against the United States?

Does the Bill of Complaint State a Cause of Action for Injunction Against S. D. Bennett?

By paragraph 4 of the Motion to Dismiss, it is asserted that this is in effect a suit against the United States.

By paragraph 8 of the Motion to Dismiss it is asserted that no sufficient cause of action for an injunction against S. D. Bennett is stated.

These two subjects are so closely related that it is believed to be advisable to treat them together.

Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. Ed. 570, holds:

> "A court of equity, said this court in Re Sawyer, 124 U. S. 200, 210, 31 L. Ed. 402, 405, 8 Sup. Ct. Rep. 482 'has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors. ********To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, ****** is to invade the domain of the courts of common law, or of the executive and administrative department of the government.' Harkrader v. Wadley, 172 U. S. 148, 170, 43 L. Ed. 399, 406, 19 Sup. Ct. Rep. 119; Fitts v. McGhee, 172 U. S. 516, 531, 43 L. Ed. 535, 542, 19 Sup. Ct. Rep. 269, 2 Story, Eq. Jur. Sec. 893, But a distinction obtains when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked, that it should restrain the defendant from instituting criminal actions involving the same legal

questions. This is illustrated in the decisions of this court in which officers have been enjoined from bringing criminal proceedings to compel obedience to unconstitutional requirements. Davis F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, 218, 47 L. Ed. 778, 780, 781, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. Ed. 169, 177, 25 Sup. Ct. Rep. 18; Ex parte Young, 209 U. S. 123, 161, 162, 52 L. Ed. 714, 729, 730, 13 L. R. A. (n.s.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas 764; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 53 L. Ed. 430, 30 Sup. Ct. Rep. 286. In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands."

Truax v. Reich, 239 U. S. 33, 60 L. Ed. 131.

"It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors' (Be Sawyer, 124 U. S. 200, 210, 31 L. Ed. 402, 405, 8 Sup. Ct. Rep. 482), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecution under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, 47 L. Ed. 778, 780, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. Ed. 169, 177, 25 Sup. Ct. Rep. 18; Ex parte Young, supra; Philadelphia Co. v. Stinson, 223 U. S. 621, 56 L. Ed. 577, 32 Sup. Ct. Rep. 340. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law."

Other cases to like effect are Hart Coal Corp. v. Sparks, 9 F. Supp. 825; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207; 48 L. Ed. 778; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169; Western Union Tel. Co. v. Andrews, 216 U. S. 165, 54 L. Ed. 430; National Remedy Co. v. Hyde, 50F. (2) 1066; Hill v. Wallace, 259 U. S. 62, 66 L. Ed. 828.

Applying the foregoing cases to the facts in the instant case, it is alleged that the law in question is unconstitutional, and plaintiffs are seeking to protect their property rights. If the Act is unconstitutional, and the motion to dismiss admits the allegations of the bill, then this is not a suit against the United States, nor is Mr. Bennett protected by his official title,

In oral argument some attempt was made to show that S. D. Bennett had not threatened to prosecute the plaintiff, D. C. Wallace. It is alleged in the bill that unless restrained he will prosecute, and this allegation is not denied under oath. Hence, for the purpose of the motion it must be taken as true. Also the observations of the Court in Hart Coal Corp. v. Sparks, supra, are particularly pertinent, in view of the testimony which S. D. Bennett gave on the stand.

The foregoing is deemed sufficient to show that this is not a suit against the United States, and that ample grounds for an injunction against S. D. Bennett are both alleged and supported by proof.

This disposes of all the questions presented by the Motions to Dismiss with the exception of the general allegations that there are no equities stated in the bill of complaint, and that plaintiffs have an adequate remedy at law. The fallacies in connection with these claims can, and will, be fully disposed of in the discussion of the right to the relief sought on the merits.

Statement of the Case

D. C. Wallace, for himself and all other cotton ginners of the State of Texas, and Texas Cotton Ginners Association, a corporation, for and on behalf of its individual members, seek by this action (1) to have the Bankhead Act declared unconstitutional, (2) to have certain of the regulations declared void and being without support in the Act itself, (3) to enjoin W. A. Thomas, Collector of Internal Revenue for North Texas, Frank Scofield, Collector of Internal Revenue for South Texas, their agents, servants and employees, and O. B. Martin, Director for the State of Texas of Henry Wallace, Secretary of the Department of Agriculture of the United States, his agents, servants and employees, from seeking to enforce said Bankhead Act as against the cotton ginners of Texas, and from compelling such cotton ginners to comply with the rules and regulations promulgated in connection therewith, and (4) to enjoin S. D. Bennett, Clyde O. Eastus, Douglas W. McGregor, and William R. Smith, the respective United States District Attorneys for the Eastern, Northern, Southern and Western Districts of Texas, from instituting or prosecuting civil and/or criminal actions against the cotton ginners of Texas to collect the tax attempted to be provided by said Act, or to enforce the various fines, penalties and prison terms provided for violations thereof.

The Bankhead Act is attacked as unconstitutional on the following grounds:

(1) As being an attempt, in the guise of a tax measure, to regulate and control the production and ginning of

cotton, in violation of the Tenth Amendment to the Federal Constitution.

(2) Because the so called tax provided for in said Act is in reality a penalty sought to be imposed to regulate and control the production and ginning of cotton, and is, therefore, void.

(3) Because the express exemption of 10,000,000 bales from the terms of said Act, and the imposition of a so called tax equal to fifty per cent of the market price of all cotton produced and ginned above that amount, shows conclusively that the Act is an unreasonable and arbitrary attempt to regulate and control the production and ginning of cotton, and is, therefore, a void measure.

(4) That the requirements of said Act, and the rules and regulations, whereby the cotton ginners of Texas, at heavy expense and without an attempt to compensate or reimburse them, are made tax collectors constitutes a taking of the property of such ginners without due process of law in violation of the Fifth Amendment to the Federal Constitution.

(5) That such Act delegates legislative authority to the Secretary of Agriculture and the Commissioner of Internal Revenue, and violates Article I, Section 1 of the Federal Constitution.

(6) That such Act is not a valid exercise of the commerce power of Congress, but is an unwarranted interference with the growing and ginning of cotton, purely intrastate activities, and hence violates the Tenth Amendment to the Federal Constitution.

(7) That Article 8 of the regulations, fixing liability for the tax upon the ginner, is void as not being supported by the Act itself.

(8) That so much of Article 13 of the regulations, as requires the ginner to secure affidavits in triplicate from the producers as to the cotton to be covered by lien cards, is void as not being supported by the Act itself.

(9) That so much of Article 20 of the regulations, as requires the ginner to execute a bond, is void as being without support in the Act itself.

(10) That so much of Article 20 of the regulations, as requires the ginner to apply for bale tags, etc., keep records thereof, make reports in regard thereto, etc., is void as being without support in the Act itself.

On the hearing for an interlocutory injunction, a number of representative ginners from various sections

of North Texas were offered as witnesses to demonstrate the practical working of the Act, and to illustrate the abnormal amount of expense, time and trouble imposed upon the ginners with absolutely no provision for compensation or reimbursement.

The evidence offered by the defendants may be fairly summarized, and dismissed, by saying that it is hoped that the ginners will not be put to so much trouble and expense this year as they admittedly were last year.

Analysis of the Act

Caption of Bill

"An Act to place the cotton industry on a sound commercial basis, to prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce, to provide funds for paying additional benefits under the Agricultural Adjustment Act, and for other purposes."

Declaration of Policy

"That in order to relieve the present acute economic emergency in that part of the agricultural industry devoted to cotton production and marketing by diminishing the disparity between prices paid to cotton producers and persons engaged in cotton marketing and prices of other commodities and by restoring purchasing power to such producers and persons so that the restoration of the normal exchange in interstate and foreign commerce of all commodities may be fostered, and to raise revenue to enable the payment of additional benefits to cotton producers under the Agricultural Adjustment Act,

"It is hereby declared to be the policy of Congress to promote the orderly marketing of cotton in interstate and foreign commerce; to enable producers of such commodity to stabilize their markets against undue and excessive fluctuations, and to preserve advantageous markets for such commodity, and to prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce, and to more effectively balance production and consumption of cotton."

Period of Applicability

Section 2 makes Act effective for 1934-1935 season, but provides President may, by proclamation, make it effective for 1935-1936 season.

Section 3(a) provides if Secretary of Agriculture, for crop year 1935-1936, finds that two-thirds of the producers favor the levying of a tax on cotton over and above the allotment, the Secretary of Agriculture is to determine what amount of cotton will be declared as tax free for that year (1935-1936).

(b) Such allotment so arbitrarily fixed by the Secretary of Agriculture is to be proclaimed sixty days before the crop year begins.

(c) By the terms of the Act itself 10,000,000 bales is declared to be the amount of cotton from the crop year 1934-1935 that may be marketed tax free.

Tax and Exemptions

Section 4(a). A tax of 50% of the average central market price of lint cotton, in no event to be less than 5 cents per pound, is levied upon the ginning of cotton.

(b) Such average central market price, to be used as the basis for the tax, is to be determined by the price seven-eighths inch middling cotton is bringing on the ten spot cotton markets (designated by the Secretary of Agriculture) as determined and proclaimed from time to time by the Secretary of Agriculture.

(c) Every person ginning any cotton subject to the tax, and every other person liable for the tax, is required to make monthly reports to the Collector of Internal Revenue, and to pay the tax to him.

(d) If the Secretary of Agriculture fails to proclaim an allotment for a particular year, no tax will be enforced that year.

(e) The following cotton is exempt from the tax:

(1) Cotton grown by experimental stations.
(2) Cotton harvested each year from each farm equal to its allotment.
(3) Cotton harvested prior to the crop year 1934-1935.
(4) Cotton having a staple of one and one-half inches, or longer.

(f) The tax on cotton which is to be stored by the producer is to be deferred, and a lien card placed on such cotton in favor of the government. The tax is to be paid when the cotton is sold.

(g) The cotton exempted under the individual allotments is to be evidenced by exemption certificates issued to the producers.

Apportionment

Section 5 (a) The Secretary of Agriculture is to apportion the allotment between the States upon the basis of the ratio of the average number of bales produced in each State during the five years next preceding the passage of the Act to the average number of bales produced in all the States during the same period. No State is to be allotted less than 200,000 bales if in any one of the five years it produced as much as 200,000 bales.

(b) Substantially the same basis is provided for the apportionment of the allotment between the counties of a particular state.

Application for Certificates

Section 6. Producers desiring to procure tax exemption certificates are required to apply for same to an agent designated by the Secretary of Agriculture. Here it is expressly provided:

> "No certificate of exemption shall be issued and no allotment shall be made to any producer unless he agrees to comply with such conditions and limitations on the production of agricultural commodities by him as the Secretary of Agriculture may, from time to time, prescribe to assure the cooperation of such producer in the reduction programs of the Agricultural Adjustment Administration and to prevent expansion on lands leased by the Government of competitive production by such producer of agricultural commodities other than cotton and the allotment of and certificates of exemption issued to any producer shall be subject to revocation on violation by him of such conditions and limitations, and no criminal penalties shall apply to the violation of this provision."

Section 7 (a) undertakes to prescribe the basis upon which tax exemption certificates are to be apportioned by the Secretary of Agriculture to the individual cotton producers within a given county. These provisions will be taken up in detail later.

(b) provides that after 1934-1935 the apportionment of tax exemption certificates shall not be controlled by subdivision (a). No attempt is made to state how it shall be done, but it is left entirely to the whim or caprice of the Secretary of Agriculture.

(c) provides the amount allotted to individual farms shall not exceed the total amount allotted to the county.

Section 8 provides that out of the allotment made to a particular state, not to exceed 10% thereof, may be doled out to certain designated parties.

Exemption Certificates

Section 9 (a). Exemption certificates shall be issued by Secretary of Agriculture, but only on proof satisfactory to the Secretary.

(b) "The right to a certificate of exemption shall be evidenced in such manner as the Secretary of Agriculture may prescribe."

(c) The certificate shall specify the amount of cotton exempt.

(d) provides that any and all certificates may be transferred or assigned.

While not authorized by the Act itself a pool was set up in Washington to facilitate the exchange of these certificates, and something over $15,000,000.00 in such certificates was handled by this pool, thereby depriving the Government of that amount of revenue under this so called tax measure.

Identification of Tax Paid or Exempt Cotton.

Section 10 (a). Upon payment of tax, or surrender of exemption certificates, collector is to surrender bale tags to place on cotton.

(b) Imported cotton is to be inspected and tagged.

(c) Cotton from years previous to effective date of Act may be identified and tagged.

(d) Government owned cotton to be tagged free.

Destruction of Means of Identification.

Section 11. When bale is opened tag must be destroyed.

Regulations by the Commissioner.

Section 12. Commissioner of Internal Revenue, with approval of Secretary of the Treasury, is to promulgate rules and regulations.

Information Returns.

Section 13 (a). All persons, having information in regard to cotton produced, are required to make returns to Collector of Internal Revenue.

(b) Any person refusing to make such return may be fined $1,000.00, or imprisoned for one year, or both.

General and Penal Provisions.

Section 14 (a). All provisions, including penalties, applicable to taxes imposed by Section 800 of Revenue Act of 1926 are made to apply to this Act.

(b) Makes it unlawful (1) to transport, except for storage, beyond boundaries of county when ginned any cotton that does not have bale tag, (2) to buy or sell a bale of cotton which does not have bale tag.

(c) No cotton seed can be exported.

(d) Imposes fine not to exceed $1,000.00, or prison term of six months, or both, for various enumerated violations of the Act.

(e) Any person who violates any regulation promulgated by either Secretary of Agriculture, or Secretary of the Treasury, for which no specific penalty is named, shall be fined not exceeding $200.00.

Regulations by Secretary of Agriculture.

Section 15 (a). The Secretary of Agriculture is authorized to make rules and regulations.

(b). The Secretary of Agriculture is authorized to make rules to protect tenants and share croppers.

Appropriations Authorized.

Section 16 (a). Such sums as may be necessary are authorized to be appropriated to carry out the Act.

(b) Out of sums available to Secretary of Agriculture under the Agricultural Adjustment Act, such sums as are needed may be used to carry on this Act.

(c) The proceeds derived from the tax are hereby authorized to be appropriated to be made available to the Secretary of Agriculture for the purpose of carrying out the cotton program of the Agricultural Adjustment Administration, and for administrative expenses and refunds of taxes under this Act.

Officers and Employees.

Section 17. The Secretary of Agriculture is authorized to make use of certain designated employees to carry out this Act.

Purchases and Services

Section 18. Certain expenses authorized to be incurred under the Act are set forth.

Collection of Taxes.

Section 19. The taxes are to be collected by the Commissioner of Internal Revenue, and paid into the Treasury of the United States.

Refunds.

Section 20 (a). No refund will be allowed unless claim is made within six months from date of payment of such tax, penalty, or sum.

(b). No suit can be maintained until claim for refund has been filed with Commissioner of Internal Revenue, under laws provided for such cases; not necessary that funds be paid under protest. Six months must expire without action by Commissioner before suit can be filed, and must be begun within two years from date of disallowance of claim.

Separability of Provisions.

Section 21. A saving clause is included so that if one section is unconstitutional others may stand.

Geographical Application of Act.

Section 22. Territory to which Act applies is described.

Definitions.

Section 23. Various definitions of terms used in the Act are set forth.

The practical application of the Act to the every day operations of the cotton ginner will be set forth in the appropriate places later in this brief.

Is the Bankhead Act Constitutional?

Coming to a consideration of this cause on its merits, the controlling factor is the constitutionality of the Act, although the plaintiffs have alleged, and will undertake to demonstrate herein, that, even if the Act itself were constitutional, the principal regulations affecting cotton ginners are not valid.

Limited Powers of Federal Government

The limited powers of the Federal Government have long been universally recognized by the courts. The statements in this regard by Chief Justice Marshall have become axiomatic.

In McCulloch v. Maryland, 4 Wheat 405, 4 L. Ed. 579, Chief Justice Marshall said:

> "This government (of the United States) is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforded by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. The principle is now universally admitted. But the question respecting the extent of the powers actually granted is purpetually arising, and will probably continue to arise as long as our system shall exist."

In Martin v. Hunter's Lessee, 1 Wheat 326, 4 L. Ed. 97, Chief Justice Marshall again says:

> "The government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

If Congress had the power to pass the Bankhead Act, such power must have been expressly given, or given by necessary implication.

Federal Police Power

The Federal Government has no police power save in the District of Columbia and in other territory within its exclusive jurisdiction.

In re Heff, 197 U. S. 488, 49 L. Ed. 848, says:

> "In this Republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however, to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government."

And Again:

"It will not be doubted that an Act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction, and could not be sustained; and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two."

In New York City v. Miln, 11 Peters 102, 9 L. Ed. 648, it is said:

"I can discriminate no line of power between the different subjects of internal police, nor find any principle in the constitution, or rule for construing it by this court, that places any part of a police system within any jurisdiction except that of a state, or which can revise or in any way control its exercise, except as specified. Police regulations are not within any grant of powers to the federal government for federal purposes; congress may make them in the territories, this district, and other places where they have exclusive powers of legislation, but cannot interfere with the police of any part of a state. As a power excepted and reserved by the states, it remains in them in full and unimpaired sovereignty, as absolutely as their soil, which has not, been granted to individuals or ceded to the United States; as a right of jurisdiction over the land and waters of a state, it adheres to both, so as to be incapable of exercise by any other power, without cession or usurpation."

."It is the highest and most sovereign jurisdiction, indispensable to the separate existence of a state; it is a power vested by original inherent right, existing before the constitution, remaining in its plentitude, incapable of any abridgment by any of its provisions."

Since there is no Federal Police Power, the Bankhead Act cannot be justified under the exercise of such power.

There exists no "sovereign and inherent power" in the Federal Government, and the Bankhead Act cannot be thus justified.

See Kansas v. Colorado, 206 U. S. 46, 51L.Ed. 956.

The Bankhead Act cannot be justified under (1) Preamble to the Constitution; (2) "General Welfare" proviso, or the "Necessary and proper clause."

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643.

As this Court has very aptly pointed out in its opinion in Amazon Petroleum Corp. v. Railroad Commission, 5 F. Supp. 648, the Supreme Court of the United States, in Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, has said:

> "The suggestion to which I have referred is an echo of an attempt to construe Article 1, Section 8, subdivision 1 of the Constitution of the United States, not as a power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States', but as conferring upon Congress two distinct powers, to-wit: (1) The power of taxation and (2) the power to provide for the common defense and the general welfare. In this view, it has been urged that Congress has the authority to exercise any power that it might think necessary or expedient for the common defense or the general welfare of the United States. Of course, under such a construction the government of the United States would at once cease to be one of enumerated powers and the powers of the states would be wholly illusory and would be at any time subject to be controlled in any matter by the dominant Federal will exercised by Congress on the ground that the general welfare might thereby be advanced. That, however, is not the accepted view of the Constitution. (1) Story on the Constitution, secs. 907, 908; 1 Willoughby on the Constitution, sec. 22). The Government of the United States is one of enumerated powers and is not at liberty to control the internal affairs of the states respectively such as production within the States, through assertion by Congress of a desire either to provide for the common defense or to promote the general welfare."

Emergency

It will doubtless be contended that the Bankhead Act can be justified as an emergency measure. As indicative of that intention, in the hearing on the bill before the Committee on Agriculture of the House of Representatives, Henry Wallace, Secretary of Agriculture, said:

> "It is not my purpose to attempt to discuss in any detail some of the legal and constitutional questions that might be involved in this measure. <u>But there is one specific point to which I would direct the attention of this committee. Under the measure as now drawn it sets up a permanent machinery</u>

for the regulation and control of the marketing, if not the actual production, of cotton. It has been suggested to me by some of our attorneys that if this measure should be challenged in the courts, the position of those whose duty it would be to sustain it would be materially strengthened if the measure was enacted only for the duration of an emergency. If the committee agrees that this suggestion is valid, it might be well to include in the title of the bill a declaration of emergency."

(see p. 32 Hearings before the Committee on Agriculture House of Representatives, Seventy Third Congress, Second Session on H. R. 8402)

Ex Parte Milligan, 4 Wall. 2, 120, 18 L. Ed. 281.

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

Schlechter v. United States, 19 L. Ed. 888.

"The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in peace and in war, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment, 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People'.

"The further point is urged that the national crisis demanded a breach and intensive cooperative effort by those engaged in trade and industry, and that this necessary cooperation was sought to be fostered by permitting them to initiate the adoption of codes.

"But the statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. It involves the coercive exercise of the law making power.

"The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes."

Home Building and Loan Ass'n. v. Blaisdell, 290 U. S. 398; 78 L. Ed. 413.

"While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' Wilson v. New, 243 U. S. 332, 61 L. Ed. 755. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus emergency would not permit a state to have more than two Senators in Congress, or permit the election of President by popular vote without regard to the number of electors to which States are respectively entitled, or permit the States to 'coin money' or to 'make anything but gold and silver coins a tender in payment of debts'. But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, and process of construction is essential to fill in the details. That is true of the contract clause."

Hart Coal Corporation, et al v. Sparks, 7 F. Supp. 16.

"Certainly no emergency, no matter how pressing, can clothe Congress with any power to legislate on matters not expressly or impliedly confided to it by the Constitution."

In the light of the foregoing authorities no great amount of comfort can be afforded the Government's attorneys in their defense of this Act on the grounds of an emergency, notwithstanding the suggestion above referred to by Secretary Wallace.

Desirability of Purpose Sought to be Accomplished

That a desirable end is sought to be attained, that the public good is intended, and other like claims, will doubtless be advanced as reasons for sustaining the Bankhead Act.

In the Legal Tender Cases, 12 Wall, 457, 20 L. Ed. 287, it was said:

> "It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger."

In Meyer v. Nebraska, 262 U. S. 401, 67 L. Ed. 390, it is said:

> "But this cannot be covered by methods which conflict with the Constitution. A desirable end cannot be promoted by prohibited means."

In Bailey v. Drexel Furniture Co., 259 U. S. 20, 66 L. Ed. 817, it is said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half."

If, therefore, it be conceded that the Bankhead Act would accomplish a worthy purpose, or is needed for the public good, which is not admitted, such grounds would not sustain its validity if it conflicts with the Federal Constitution.

Temporary Nature of Measure

That the Bankhead Act is expected to be in force for a comparatively short period of time cannot be urged as a reason for sustaining its validity. Under its own terms, it has already been in force for the crop year 1934-1935, and, by Presidential proclamation, will be in force for the crop year of 1935-1936.

In the first place, it is respectfully urged that the legal principles involved would be identically the same whether the Act remained in force six months or two years. If it is an invalid piece of legislation, and violates the Constitution of the United States, the period of time for which it is intended to operate could not justify its existence.

In the second place, as has already been pointed out in referring to the testimony of Secretary Wallace, the bill as originally introduced provided permanent machinery. It was changed to an emergency or temporary measure solely to aid in upholding its validity. If the courts should sustain the present measure, there can be little doubt but that the measure will then be made permanent.

Right to Regulate Cotton Ginning Per Se

In Savings & Loan Trust Ass'n. v. Topeka, 20 Wall. 655, 22 L. Ed. 455, it is said:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.
>
> "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers."

Likewise, in Butchers' Union, Etc. Co. v. Crescent City Live Stock Co., 111 U. S. 746, 28 L. Ed. 585, it is said:

> "As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all governmental action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident,' that is, so plain that their truth is recognized upon their mere statement, 'that all men are endowed;' not by edicts of Emperors or decrees of Parliament or Acts of Congress, but 'by their Creator, with certain inalienable rights' that is, rights which cannot be bartered away or given away or taken away except in punishment of crime; ' and that among these are life, liberty, and the pursuit of happiness, and to secure these,' not grant them but secure them, 'governments are instituted among men, deriving their just powers from the consent of the governed.'
>
> "Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, <u>in any manner not inconsistent with the equal rights of others,</u> which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment.
>
> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

In this connection, your petitioners herein are merely urging their inalienable rights to pursue the lawful occupation of cotton ginning free from government interference. Such occupation is not affected with a public interest, does not have any relationship to public health, morals, sanitation, fraud, unethical dealings, or crime, and, in and of itself, affords no grounds for

the present unwarranted interference with its peaceful pursuit by such persons as may see fit to follow it.

Such attempts to regulate purely private enterprises have been universally condemned, and the authorities are numerous. Among others which might be cited are the following:

Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937; Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240; Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662; Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630; Tyson and Brother v. Vanton, 371 U. S. 418, 47 S. Ct. 426; Fairmount Creamery Co. v. Minnesota, 274 U. S. 1, 47 S. Ct. 506; Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545; Williams v. Standard Oil Co., 278 U. S. 235, 49 S.Ct. 115; New States Ice Co. v. Liebmann, 285 U. S. 263, 52 S. Ct. 371.

Is the Bankhead Act a Valid Exercise of the Commerce Powers of Congress?

Doubtless one of the strongest arguments which will be urged to uphold the validity of this Act will be that it merely constitutes a valid exercise of the powers of Congress to regulate interstate commerce.

The thorough grasp of this phase of the question and the complete familiarity with the controlling decisions, exhibited by this Court in his written opinion in Amazon Petroleum Corporation v. Railroad Commission, 5 F. Supp. 639, makes plaintiffs somewhat reluctant to impose upon the Court's citation of the pertinent authorities. However, a thorough discussion of the subject requires that this be done.

Before reverting to the authorities a brief consideration of the Act itself is necessary. If the regulation of interstate commerce was the purpose of the Act, one would naturally expect to find such purpose disclosed by its terms.

In the caption of the Act it is declared to be:

> "An Act ---------- to prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce."

Under the "Declaration of Policy", it is provided:

> "It is hereby declared to be the policy of Congress to promote the orderly marketing of cotton in interstate and foreign commerce; ---------- and to

prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce."

Under the "Period of Applicability" it is provided:

Sec. 3 (a). "the Secretary shall ascertain from an investigation of the available supply of cotton and the probable market requirements the quantity of cotton that should be allotted, in accordance with the policy declared in section 1, for marketing in the channels of interstate and foreign commerce".

Under "Apportionment", it is provided:

Sec. 5 (a) "When an allotment is made, in order to prevent unfair competition and unfair trade practices in marketing cotton in the channels of interstate and foreign commerce, the Secretary shall apportion to the several cotton producing States the number of bales the marketing of which may be exempt from the tax herein levied, -------

"It is prima facie presumed that all cotton and its processed products will move in interstate or foreign commerce."

After a most careful study of the language of the Act, it is believed that the foregoing quotations are the only references to the subject of interstate commerce.

A detailed study of the Act in its entirety will reveal that it imposes a tax "on the ginning of cotton", and provides that such tax shall be "50 per centum of the average central market price per pound of lint cotton, but in no event less than 5 cents per pound." Sec. 4(a).

It is further provided that monthly returns of all cotton ginned shall be made to the Commissioner of Internal Revenue, and "The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return". Sec. 4 (c).

It is further provided that for the crop year 1934-1935 ten million bales of cotton shall be exempt from the tax. Sec. 3(c).

Elaborate provision is made for the apportionment between the States of the amount of cotton to be thus exempt from the tax, and in turn between the respective counties within a given state, and to the individual farms within the county. Sec. 5(a & b). Sec. 7.

Exemption certificates are provided for the producers, and the method of obtaining same set out in detail. Secs. 6 and 9.

Machinery is provided for issuing bale tags, tagging certificates, and lien cards, for tagging the cotton when the tax is made, making reports thereof to the collector, etc.

Severe penalties are provided for the failure to make the returns called for, (Sec. 13 b) and for various other infractions (Sec. 14), but a significant fact is that no specific penalty is provided for moving the cotton in interstate commerce.

It will thus be seen that the entire operation of the Act centers around the "ginning of cotton", and the gin is made the center of activities, and the ginner is made the burden bearer of the Act.

That it was the intention of Congress to control the production of cotton at the gin is clearly evidenced by the proceedings in connection with this bill in its original form. As stated on the trial of this cause, legislation on this subject originated in the Senate when Senator Bankhead of Alabama introduced a bill "To Regulate the Production and Ginning of Cotton", known as Senate Bill 1974, which was referred to the "Committee on Agriculture and Forestry" of the United States Senate.

A copy of the hearings before that Committee is tendered with this brief, and the Court's attention is invited to the text of the bill on pages 1-3 for comparison with the present Bankhead Act.

The Court's attention is invited to the statement of Senator Bankhead, on page 3, where he states that the object of the bill is (1) to reduce to normal size the abnormal carry over of cotton, and (2) to stabilize the price of cotton.

Also on page 4 where he says that the Administration desires to obtain a 40% reduction in cotton.

Further that this can best be obtained by bales than acres.

Also on page 6 where he states that the bill seeks to supplement acreage reduction by bale control.

Also on page 7 where he explains the method of enforcement.

Also on page 13 where he states Secretary Wallace is in favor of the "principles of the bill, that is, control."

Also on page 15 where he offers in evidence a letter from the Alabama Commissioner of Agriculture calling this the "gin control bill", and immediately admits it is intended to regulate "the amount of cotton ginned".

Also on page 16 where he says the farmers will adjust their planting to the allotment made.

Also on page 17 where he offers in evidence the resolutions adopted in Alabama to limit the production of cotton.

Also to the testimony of H. D. Wilson, State Commissioner of Agriculture of Louisiana, on pages 20-21, where he says the farmers of his state want the production of cotton regulated and reduced, and it can best be done at the gin.

Also on page 25 where Secretary Wilson says it will take a law that will absolutely control the number of bales that can be produced.

Also pages 28-30 where C. C. Adams, Commissioner of Agriculture for Georgia, makes substantially the same statements.

Also pages 30-37 where J. D. Holton, Commissioner of Agriculture for Mississippi, gives the same character of testimony.

Also to page 44 where William B. Graham, Commissioner of Agriculture for North Carolina, says he knows of no better way to regulate the cotton industry than to pass this bill.

Also to pages 69-92 where Oscar Johnson, Manager of Cotton Producers Pool, speaks of "legislative control of the business of agriculture."

Also to pages 92-104 where C. A. Cobb, Chief of the Cotton Section Department of Agriculture, and particularly his paper on pages 100-104 comparing the original Bankhead bill and the Tax Plan.

The relevancy of this original bill, and the hearings in connection therewith, consists of the fact that it was later deemed advisable to revamp the bill and introduce it in the House of Representatives as a so called revenue measure.

We will now consider the authorities to see if legislation of this character can be upheld as a valid exercise of the power of Congress to regulate interstate commerce.

Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346, announces the following:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacturers and commerce. Manufacture is transformation - the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in County of Mobile v. Kimball, 102 U. S. 691, 702 (26: 238, 241), is as follows: 'Commerce with foreign Nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining - in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all these delicate, multiform, and vital interests - interests which in their nature are, and must be, local in all the details of their successful management.
>
> "It is not necessary to enlarge on, but only to suggest, the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details.

"It was said by Chief Justice Marshall that it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign Nations and among the several States was to insure uniformity of regulation against conflicting and discriminating state legislation. See also County of Mobile v. Kimball, supra, 697 (26: 240).

"This being true, how can it further that object so to interpret the constitutional provision as to place upon Congress the obligation to exercise the supervisory powers just indicated? The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in its, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such an interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the State Governments, and more provocative of conflicts between the General Government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine.

"We find no provisions in any of the sections of the statute under consideration, the object and purpose of which are to exert the jurisdiction of the State over persons or property or transactions within the limits of other States; or to act upon intoxicating liquors as exports; or while they are in process of exportation or importation. Its avowed object is to prevent,

not the carrying of intoxicating liquors out of the State, but to prevent their manufacture, except for specified purposes, within the State. It is true that, notwithstanding its purposes and ends are restricted to the jurisdictional limits of the State of Iowa, and apply to transactions wholly internal and between its own citizens, its effects may reach beyond the State by lessening the amount of intoxicating liquors exported. But it does not follow that, because the products of a domestic manufacture may ultimately become the subjects of interstate commerce, at the pleasure of the manufacturer, the legislation of the State respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon Congress. Can it be said that a refusal of a State to allow articles to be manufactured within her borders (for export) any more directly or materially affects her external commerce than does her action in forbidding the retail within her borders of the same articles after they have left the hands of the importers? That the latter could be done was decided years ago; and we think there is no practical difference in principle between the two cases.

"'As has been often said, legislation (by a State) may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution', unless, under the guise of police regulations, it imposes a direct burden upon interstate commerce, or directly interferes with its freedom."

Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101. Congress sought to prohibit the shipment in interstate commerce of products manufactured in plants using child labor. The Act was declared unconstitutional as an unwarranted interference with a purely local subject. The language of the entire opinion is pertinent to the subject matter of this suit.

That products in process of mining, manufacturing or production are not subject to regulation as interstate commerce simply because they are later to be used or transported in interstate commerce is supported by United States v. E. C. Knight Co., 156 U. S. 1, 39 L. Ed. 325; Heifler v. Thomas Colliery Co., 260 U. S. 245, 67 L. Ed. 237; Oliver Iron Mining Co. v. Lord, 262 U. S, 172, 67 L. Ed. 929; Utah Power & Light Co. v. Pfost, 286 U. S. 165; 76 L. Ed. 1038.

In re Crescent Cotton Oil Co. v. State of Mississippi, 257 U. S. 129, 66 L. Ed. 166, a state law dealing with cotton gins was attacked as unconstitutional

upon an instrumentality of interstate commerce. The Court said:

> "The separation of the seed from the fiber of the cotton, which is accomplished by the use of the cotton gin, is a short but important step in the manufacture of both the seed and the fiber into useful articles of commerce, but that manufacture is not commerce was held in (citing authorities). And the fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce. (Citing authorities). When the ginning is completed, the operator of the gin is free to purchase the seed or not; and, if it is purchased, to store it in Mississippi indefinitely, or to sell or use it in that state, or to ship it out of the state for use in another; and, under the cases cited, it is only in this last case, and after the seed has been committed to a carrier for interstate transport, that it passes from the regulatory power of the state into interstate commerce and under the national power.
>
> "The application of these conclusions of law to the manufacturing of the cotton gins, which we have seen precede but are not part of the interstate commerce, renders it impossible to consider them an instrumentality of such commerce, which is burdened by the Anti-Gin Act, and the first contention of the plaintiff in error must be denied."

Federal Compress & Warehouse Co. v. Mc Lean, 291 U. S. 17, 78 L. Ed. 622, was a case involving the validity of an excise tax levied by the State of Mississippi for the privilege of operating a cotton compress and for operating a warehouse. The appellant shipped all but a negligible quantity of the cotton compressed and stored by it in interstate commerce, and asserted that this tax was a burden on interstate commerce.

In refusing to recognize the interstate character of the busines, Mr. Justice Stone said:

> "It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce and hence is not a subject of interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end and although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin and so it does not become exempt from local tax until its shipment to points of

destination outside the state. Before shipping orders are given, it has no ascertainable destination without the state, and in the meantime, until surrender of the warehouse receipts, it is subject to the exclusive control of the owner. Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. (Citing authorities)

A non-discriminatory tax upon the business of storing and compressing the cotton, which is not itself the subject of a movement in interstate commerce, is not forbidden. Most articles, before their shipment in interstate commerce, have had work done upon them which adapts them to the needs of commerce and prepares them for safe and convenient transportation, but that fact has never been thought to immunize from local taxation either the articles themselves or those who have manufactured or otherwise prepared them for interstate transportation. (Citing authorities). Here the privilege taxed is exercised before interstate commerce begins, hence the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations. (Citing authority) The case, therefore, stands on a footing different from those in which local regulations of the business of purchasing a commodity within and shipping it without the state have been deemed to impede or embarrass interstate commerce in those commodities. (Citing authorities).

"The fact that appellant's contract with the interstate rail carrier has designated appellant as the carrier's agent and appellant's warehouse as the carrier's depot cannot alter the legal consequences of what is actually done with the cotton by its owners or of their power of control over it, or of the actual course of dealing with it by appellant. It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause. (Citing authorities).

Likewise in Chassaniol v. City of Greenwood, 291 U. S. 584, 78 L. Ed. 1004, Mr. Justice Brandeis said:

"Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is

> the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in Federal Compress & Warehouse Co. v. McLean; and the rule there declared must govern here. Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax."

Based upon the legal principles annnounced in the foregoing decision, it is inconceivable that the Bankhead Act can be sustained as a valid exercise of the power of Congress to regulate interstate commerce. The sole thing attempted to be done by the Act is to levy an exorbitant tax on the "ginning of cotton". That the purpose of such tax is to discourage the raising of cotton in excess of the amount allotted to be exempt is too apparentto require discussion. That both the production and ginning of cotton are purely intrastate matters, exclusively within the control of the individual States, cannot be denied. Hence, it is confidently asserted that the Bankhead Act cannot be sustained upon the ground just considered.

Is the Bankhead Act a Valid Revenue Measure?

As a last resort an effort will doubtless be made to sustain the constitutionality of this measure upon the ground that it is a valid excise tax which Congress had the power to levy upon the ginning of cotton.

In reply to such contention plaintiffs aver:

(1) That said Act is an attempt, under the guise of a so called tax, to regulate and control the production and ginning of cotton.

(2) That said Act is an attempt, in the guise of a tax which is in reality a penalty, to regulate and control the production and ginning of cotton.

Plaintiffs further contend that it appears from the face of the Act itself that it is in reality an unconstitutional attempt, by means of a so called tax, to regulate the production and ginning of cotton, and they here undertake to demonstrate that face by an analysis of the Act.

The caption says it is an Act:

(1) To place the cotton industry on a sound commercial basis.

(2) To prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce.

(3) To provide funds for paying additional benefits under the Agricultural Adjustment Act.

(4) For other purposes.

This Court knows that the subject of a legislative act must be covered by the caption or it is void. Does the caption here cover the subject of raising revenue for a public purpose, which is the only purpose for which a valid tax may be imposed?

Certainly subdivisions (1) and (2) have no relationship to the question of revenue, and need no further comment.

Subdivision (3) merely says "to provide funds for paying additional benefits under the Agricultural Adjustment Act." This Court is charged with knowledge of the terms and provisions of that Act, and doubtless has given some study to its terms and provisions. The Agricultural Adjustment Act itself is believed by many, including the author of this instrument, to be unconstitutional, and it is under fire from many sources at this time. Whether it be constitutional, or unconstitutional, it makes no pretense to being anything other than an emergency measure designed to stabilize the basic agricultural commodities, and to pay out doles to various types of producers in exchange for their voluntary agreement to plow up cotton, kill livestock, reduce acreage, and forego other valuable rights. No student of either law or economics will contend for one moment that benefits paid, or to be paid, under its terms and provisions are being used for public, or governmental purposes. Hence, it is clear that if the Bankhead Act is intended to raise funds for paying additional benefits under the Agricultural Adjustment Act, such purpose falls far short of providing revenue for a public purpose, which is the only purpose for which a valid tax may be levied. It is merely taking, by legal (?) coercion the funds from one class of citizens and handing them over to another class.

Declaration of Policy

The first section of this Declaration is but a restatement in fuller terms of the caption itself, and calls for no further discussion.

The second section of this Declaration says the policy of Congress is declared to be:

(1) To promote the orderly marketing of cotton in interstate and foreign commerce.

(2) To enable producers of such commodity to stabilize their markets against undue and excessive fluctuations.

(3) To preserve advantageous markets for such commodity.

(4) To prevent unfair competition and penalties in putting cotton into the channels of interstate and foreign commerce.

(5) To more effectively balance production and consumption of cotton.

Thus in the declaration of this policy of Congress with regard to this so called revenue measure, there is not one word said about the raising of revenue. On the other hand, there is everything said, which could properly be said, about regulating the production of cotton, and stabilizing the prices to be received for same.

The policy is declared "to relieve the present acute economic emergency", and is authorized to be kept in force by proclamation of the President if he "finds that the economic emergency in cotton production and marketing will continue or is likely to continue". Though this is claimed to be a revenue measure, it is not asserted that there is an "economic emergency" which requires the raising of funds for its relief. On the contrary, the emergency is affirmatively declared to be with regard to cotton production and marketing, and when the Court reads the legislative history and background of this Act, and the Court is authorized to do so, it will clearly be seen that the "economic emergency" thus referred to is that it was claimed that there was an abnormal carry over of surplus cotton.

It is further provided in Sec. 3(a) that if the Secretary of Agriculture finds that two-thirds of the producers of cotton favor the levy of a tax on "the ginning of cotton" in excess of an allotment made to meet the probable market requirements, and determines that such tax is needed to carry out the policy of Congress above stated, he is to ascertain "from an investigation of the available supply of cotton and the probable market requirements the quantity of cotton that should be allotted" for the coming year.

Since the immediate question under consideration here is the restraint of the Bankhead Act for the crop year

1935-1936, it is particularly pertinent to consider how, and why, the Act is to be effective this year.

In the first place, the President must find, and evidently has found, that the "economic emergency" will continue, or is likely to exist, before he issues his proclamation. That "economic emergency", as we have already seen, has nothing to do with raising revenue.

In the second place, the Secretary of Agriculture is to find that two thirds of the producers favor taxing the ginning of cotton in excess of the market requirments. If this is a true revenue measure why would not all of the cotton be taxed? If it is not a regulatory measure to control production why would only the excess be taxed?

In the third place, the Secretary must first find that the tax is needed to carry out the policy of Congress above stated. The policy of Congress plainly has nothing to do with the raising of revenue, and has everything to do with regulating the production of cotton, and undertaking to stabilize its markets and improve its price. Hence, here is a declared purpose that the Act is not to be effective for the crop year 1935-1936 unless the Secretary of Agriculture first finds that the tax will be needed to regulate cotton.

Attention is next directed to the fact that Sec. 3(c) expressly exempts 10,000,000 bales of cotton from the tax for the crop year of 1934-1935. This Court will take judicial knowledge of the fact that the official report of the Secretary of Agriculture recently released shows that the entire crop for 1934-1935 in the United States was less than 10,000,000 bales. This Court will further find, from an examination of the legislative history of this Act, that it was the avowed purpose of the Administration to secure a 40% reduction in the cotton crop for 1934-1935, and, if possible, to hold such crop down to 10,000,000 bales, or less. If this was, in truth and in fact, a legitimate tax measure why would it be provided that the entire crop, which it was desired to raise, should be exempt from the tax?

In close analogy to the above, it is to be noted that the Secretary of Agriculture is not bound by the 10,000,000 bale allotment for the year 1935-1936, but is left to his discretion in proclaiming the amount of cotton to be exempted from the tax for that year. In determining the amount thus to be allotted he is instructed to ascertain that amount "from an investigation of the available supply of cotton and the probable market requirements." In other words, the Secretary of Agriculture is to exempt from the tax for 1935-1936 all the cotton believed to be needed to meet "the probable market requirements." Such

allotment, we are informed, has been fixed at 11,000,000 bales for 1935-1936. If this be in reality a revenue measure why is the Secretary of Agriculture authorized to exempt from the tax all the cotton estimated to be needed to meet the market requirements?

Tax and Exemptions

By Sec. 4 (a) the tax levied on the ginning of cotton is placed at 50 per centum of the average central market price per pound of lint cotton. The very exorbitance of the tax thus decreed speaks more eloquently than could words as to the real purpose of the tax.

An examination of the legislative history of this Act will disclose that the tax was first placed at the arbitrary figure of 12 cents per pound, then changed to 75 per centum, and finally placed at 50 per centum. Such examination will further show that Chairman Jones, of the House Agricultural Committee, cited the case of Hill v. Wallace, supra, in the committee hearings, and had the mistaken idea that the Act there declared unconstituional was so declared solely because the Court said the tax was so high it disclosed that no intent existed to raise revenue. He urged the lowering of the rate so that it would not affirmatively appear from the bill that there was no real intent to raise revenue.

Application for Certificates

The following significant language is to be found in Sec. 6 of the Act:

> "No certificate of exemption shall be issued and no allotment shall be made to any producer unless he agrees to comply with such conditions and limitations on the production of agricultural commodities by him as the Secretary of Agriculture may, from time to time, prescribe to assure the cooperation of such producer in the reduction programs of the Agricultural Adjustment Administration and to prevent expansion on lands leased by the Government of competitive production by such producer of agricultural commodities other than cotton and the allotment of andcertificates of exemption issued to any producer shall be subject to revocation on violation by him of such conditions and limitations, and no criminal penalties shall apply to the violation of this provision."

The Court will doubtless recall that on the hearing of this cause, in desperation defendants' counsel sought to show that the above quoted provision had not been enforced by the Secretary of Agriculture. Regardless of whether it has been enforced, the Act itself clothes

the Secretary with the power to deny a producer exemption certificates to which he would otherwise be entitled unless he "agrees to comply with such conditions and limitations on the production of agricultural commodities by him as the Secretary of Agriculture may, from time to time, prescribe to assure the cooperation of such producer in the reduction programs of the Agricultural Adjustment Administration". Thus not only does this so called revenue act give the Secretary of Agriculture autocratic power to tell the farmer of Texas how much cotton he may raise, but it enables the Secretary to refuse exemption certificates to him unless he agrees to reduce any and all other crops the Secretary may see fit to tell him to reduce. The "Rs" are clearly confused. This is regulation, no revenue.

Exemption Certificates

Sec. 9(d) is perhaps the most remarkable provision in the entire Act when viewed from a revenue standpoint. It is expressly provided that the exemption certificates may be transferred or assigned, under the direction of the Secretary of Agriculture.

A practical illustration of this situation is believed to be helpful. Under the allotment originally prescribed by the Secretary farmer A was rewarded exemption certificates to cover 100 bales of cotton and farmer B was awarded exemption certificates to cover 50 bales. Before the end of the crop year it develops that farmer A will only need certificates for 50 bales, but farmer B needs certificates for 100 bales. Under the theory of the Act farmer B, would be required to pay the tax on his 50 bales that exceeded his allotment, but, under the above provision, he may obtain farmer A's excess certificates and thus escape the payment of the tax. If there is any other law in the Federal Statutes, or the Statutes of Texas, with a similar provision in it, such law has escaped the attention of the author of this instrument.

In this connection, the Court's attention is invited to pages 82-84 of the Hearing before The Committee on Agriculture House of Representatives, Seventy Fourth Congress, First Session on H. R. 5578 to "Amend the Cotton Control Act" held Feb. 20-25, 1935, wherein it is stated that through a pool set up in Washington by the Secretary of Agriculture, as of December 1, 1934, $9,553,786.71 had been realized in the exchange of these certificates.

The Court will also recall that the representative from the Secretary's office who testified on the hearing of this bill admitted that by the end of the 1934-1935 crop year the amount of certificates handled through the pool was $15,000,000.00.

The Court will also take judicial knowledge of the fact that the Secretary of Agriculture has recently issued a report wherein he stated that in addition to the certificates handled through the pool, it was estimated that some $10,000,000.00 worth of certificates had been privately exchanged.

A particular illustration of the operation of the pool may be thus shown. It is known that Texas produced less cotton than was allotted to this state whereas Mississippi had a bumper crop. Texas farmers sent their surplus exemption certificates to the pool in Washington. The pool in turn sent them to Mississippi, sold them for the Texas farmers to the Mississippi farmers at a reduction (understood it was on the basis of four cents a pound), collected the money and remitted it to the farmers in Texas. Thus the $15,000,000.00 handled through the pool went to the farmers who owned the exemption certificates. So long as no more cotton was actually produced than had been previously allotted, the Government was satisfied. It was not seeking revenue, it was merely controlling production.

It is an established fact that notwithstanding the enormous expense to which the Government was put in enforcing the Bankhead Act for 1934-1935, only the comparatively insignificant sum of approximately $800,000.00 was realized as taxes, whereas something like $25,000,000.00, which would otherwise have gone to the Government as revenue, was, through the assistance of the Government, bartered between the farmers in various sections of the country.

Appropriations Authorized

Sec. 16 (c) provides that the proceeds realized from this tax are to be made available to the Secretary of Agriculture for the purpose of carrying on the cotton program of the Agricultural Adjustment Administration, and for administrative expenses and refunds of taxes under the Act.

This Court will take judicial knowledge of the fact that the "cotton program" thus referred to was strictly one of reduction in the production of cotton by means of the plow up campaign, voluntary agreements to reduce the acreage devoted to cotton in exchange for Government checks, etc. Thus it will be seen that the farmer who produced more cotton than was allotted to him, was required to pay an exorbitant tax on the excess, and the money thus paid was used to carry on the reduction program.

Before leaving this rather hurried analysis of the Act, attention is called to the broad powers conferred upon the Secretary of Agriculture under the terms of this Act. His control and domination of the situation will be dealt with more fully under the discussion of the invalidity of

the Act because of the delegation of legislative powers. For the present, however, it is deemed significant to point out that the Secretary of Agriculture, who normally has no duties in connection with the enforcement of true revenue measures, since such powers and duties are usually vested in the Treasury Department, is made the dominant factor herein. It is even provided that if he fails to make an allotment for a given year, there shall be no tax for that year. If it was truly a revenue measure would this situation exist?

Before taking up the authorities dealing with this phase of the case, the Court's attention is invited to the legislative history of this Act, for in ascertaining the purpose of a statute the Court is authorized to take into consideration such legislative history. Some of the authorities warranting such procedure are the following:

Church of Holy Trinity v. United States,
143 U. S. 457, 36 L.Ed. 226
(Title may be considered)

Stafford v. Wallace, 258 U. S. 495, 66 L.Ed. 735,
(Committee hearings discussed)

United States v. Katz, 271 U. S. 354, 70 L. Ed. 986.
(Committee reports considered)

United States v. New York and Cuba Mail Steamship Co.,
269 U. S. 304, 70 L. Ed. 281.
(Statements of committee members considered)

Ex Parte Williams, 277 U. S. 267, 72 L. Ed. 877
(Statements of members in charge of bill on
Floor considered)

To aid the Court in this task there is tendered with this brief the "Hearing Before the Committee on Agriculture House of Representatives, Seventy Third Congress, Second Session, on H. R. 8402." This pamphlet is headed "Bankhead Cotton Control Bill".

Another significant fact is the particular committee to which it was referred, and by which it was reported out and sponsored. Revenue measures do not usually come from this committee.

While the entire document will prove interesting, and very enlightening, the Court's labors may be lessened somewhat by the following excerpts therefrom:

Mr. C. A. Cobb, Chief of Cotton Section Agricultural Adjustment Administration.

P. 2. "The bill before you is an attempt to regulate production, as far as production can be regulated, recognizing

the limitation factors so as to bring about a balance between supply and demand for cotton."

P. 2. "Our objective at the present time, and that is the purpose of the measure presented here, is definitely to continue our efforts of adjustment until we can bring about a balance between supply and demand."

P. 3. "The bill which is before you is an attempt to bring about the stabilization of sound economic conditions in the South."

P. 3. "In the preparation of this bill we have had as our main objective the objective that I have just emphasized, that as far as possible we should balance our supply and demand for the future."

P. 4. "We have found that the producers feel that a tax is the most desirable device for bringing about control."

P. 10. "MR. HOPE. Can you give me the figures or the percentages showing which one of the three plans seems to be the most popular among those to whom you sent the questionnaire?

"MR. COBB. Plan (c), 42 percent.

"MR. HOPE. That was the last plan?

"MR. COBB. That was to require that when a majority of cotton producers have approved an acreage reduction program, all cotton producers would be compelled to accept the program and make the necessary reductions in cotton acreage, even to the extent of licensing each farm.

"(a) was 31 percent; (b) 27 percent. Both of those are in favor of a tax, and 3 is not necessarily in favor of a tax.

"(a) is the plan to impose tax, and (b) is the gin control of the number of bales each producer may gin or sell.

"MR. HOPE. (a) is the plan that would impose the tax?

"MR. COBB. Yes, This bill has the tax feature, and woul use the tax as a device to bring about effective control.

"MR. BANKHEAD. There will be no revenue required?

"MR. COBB. The purpose is not for revenue, Congressman Hope, but is to be used as a device to bring about effective control.

"Now, are there other questions?

"THE CHAIRMAN. I would like to ask you a question.

"MR. COBB. Yes, Mr. Chairman.

"THE CHAIRMAN. I assume from your statement that it is not your thought or the thought of the Administration to reduce cotton to the domestic consumption basis; this is simply to adjust the production of cotton to its proper place in the world picture."

P. 11. "THE CHAIRMAN. Do you feel that it is necessary to reduce the cotton production in America to 9,000,000 bales in order to accomplish that result?

"MR. COBB. We have had considerable discussion on that point, Mr. Chairman, and the Senator and I have agreed to raise that to 10,000,000 bales; personally I would prefer 10,000,000 bales; I think it is highly desirable that we make provision for 10,000,000 bales of cotton."

P. 12. "MR. CUMMINGS. I would like to ask this question: As I understand it, the object of this bill is to increase the price of cotton?

"MR. COBB. Yes, to stabilize the price."

P. 13. MR. GILCHRIST. I have not had an opportunity to study the bill enough to know just what it provides, in a few words. Can you tell me in just one or two words just what this bill would do? I do not want more than one or two sentences.

"MR. COBB. This bill is an attempt to hold American cotton production down to the amount needed to take care of the supply; and to control the amount flowing into the channels of trade.

"MR. GILCHRIST. I mean, the machinery of the bill.

"MR. COBB. The machinery of the bill?

"MR. GILCHRIST. Yes.

"MR. COBB. The machinery of the bill would be the Department of Agriculture and its employees, perhaps more particularly stated the Agricultural Adjustment Administration at the present time and as long as it functions, and then of course the cotton section would have the responsibility of applying the bill to the program, and this would be applied through the extension force, which means the directors of the extension work, and the agents in extension work, the county extension agents, and through the county control associations, which have been organized to carry on the emergency movement, that has been put into effect since the enactment of the Agricultural Adjustment Act."

"MR. CHAIRMAN. Then when that allotment is made if a man produces more than his allotted number of bales he is required to pay a tax for the ginning of that cotton, and that tax as it is now provided in the bill would be practically a prohibitive tax.

"MR. COBB. That is, if he sold the cotton."

P. 16. "MR. FLANNAGAN. I do not know a great deal about the cotton situation, Mr. Cobb, because we do not raise cotton in my state. But, the thing that is worrying me about this bill is this: It seems to be an attempt to regulate cotton production by the imposition of a tax. Is that right?

"MR. COBB. That is right.

"MR. FLANNAGAN. Could that be done?

"MR. COBB. I will have to ask the lawyers to answer that question, Mr. Flannagan."

SECRETARY OF AGRICULTURE WALLACE

P. 32. "It is not my purpose to attempt to discuss in any detail some of the legal and constitutional questions that might be involved in this measure. But there is one specific point to which I would direct the attention of this committee. Under the measure as now drawn it sets up a permanent machinery for the regulation and control of the marketing, if not the actual production, of cotton. It has been suggested to me by some of our attorneys that if this measure should be challenged in the courts, the position of those whose duty it would be to sustain it would be materially strengthened if the measure was enacted only for the duration of an emergency. If the committee agrees that this suggestion is valid, it might be well to include in the title of the bill a declaration of emergency."

SENATOR JOHN H. BANKHEAD

P. 82. "They know, because they followed that answer with a specific indication of a method of control, either one, by the imposition of a tax which they knew, as we know, is intended to limit the supply of cotton, or, second, by the definite total that may be ginned; or, third, by licensing every farmer so as to bring about compulsory control."

P. 92. "MR. GLOVER. And I was almost convinced that we ought to have such a plan. What is your judgment now concerning the tax feature of it; do you want that as a part of the control plan?

"SENATOR BANKHEAD. Mr. Glover, whichever one is more clearly constitutional. The bill which was originally introduced undertook to control it at the gin; in other words, to issue the allotment certificate and each producer must be provided with a baleage-control allotment and only cotton covered by an allotment certificate. And that very subject has been very widely discussed in the South, and, of course, would be effective. And in my judgment if we can take the National Industrial Recovery Act as a basis for the authority granted to Congress to regulate interstate commerce as being valid, certainly we could apply it to a raw commodity practically 100 per cent of which, either in the raw state of the manufactured state moves in interstate and foreign commerce. But, the only point there is to get a method to make what we want to do effective, and I think this does it. Frankly I changed the plan on the request of the President. He consulted lawyers and others and he thought the tax basis would be better.

"MR. GLOVER. Yes.

"SENATOR BANKHEAD. And that is a point where I could not proceed further.

"MR. GLOVER. As a legal safeguard would it not be well to consider in the beginning of this bill a statement to the effect that an emergency exists?

"SENATOR BANKHEAD. The trouble about that is this, and I think the President fully agrees with me, that this is something that ought to remain on the books, not only for use this year but the future."

P. 98. "SENATOR BANKHEAD. I understand, but my thought is that if we want to accomplish the thing, and I know we are going to try to do it, that we want to work it out on a permanent basis."

"SENATOR BANKHEAD. None whatever, Mr. Chairman. I have but one objective and everything else leads to it. My objective is to control the number of bales of cotton produced."

"SENATOR BANKHEAD. On some compulsory basis, on a basis that would allot to each farmer the number of bales that will move into the channels of trade.

"THE CHAIRMAN. We all understand that is what is desired.

Pp. 99-102. "SENATOR BANKHEAD. I will furnish them for the record; yes.

"THE CHAIRMAN. Now, there is another proposition: Of course, one of the difficulties arises in levying a tax; levying a tax for revenue purposes and levying a tax for regulatory purposes. I was a member of the committee when the grain taxing act was drafted, using as a basis the McCray case, levying a tax of 20 cents a bushel on the sale of futures wheat in the market-

"SENATOR BANKHEAD. Contracts for the sale of -

"THE CHAIRMAN. On contracts for sales of futures.

"SENATOR BANKHEAD. Yes.

"THE CHAIRMAN. Which provided an exemption for exchanges which complied with certain rules and regulations, and the court citing the McCray case and differentiating, held that that was unconstitutional as it was an attempt through the taxing power, under the guise of using the taxing power to regulate; and they said that the tax was so high that no revenue was contemplated. And, that is one of the phases that presents itself in this bill.

"Now, that case was decided on May 15, 1922, at the same time the second child-labor case was decided. Both of those were cases undertaking to tax, not with the idea of securing revenue, but with the idea of regulation. I would like to have your discussion on that.

(Here follows an attempt by Senator Bankhead to differentiate the case referred to. As the cases themselves will be cited and discussed fully in this brief, the discussion will be omitted here).

"THE CHAIRMAN. I think when you are putting the tax so high, as you have it in this bill, that we would like to have something in the record to distinguish that from the cases just cited. Whatever we do we want it to be effective. I do not.

want to be put in the position of simply appearing to try to do something that is going to be held back on some constitutional ground.

"SENATOR BANKHEAD. It must be made effective, of course, Mr. Chairman. There is no use doing anything unless it is.

"THE CHAIRMAN. For instance, in the McCray case, they sustained the oleomargarine tax on a finding that it was not for the purpose of regulation, but as a matter of fact it did produce some revenue and would be just as effective as if it had produced several millions of dollars.

"The last paragraph of that case it is conceded that if the tax is put up high enough to make it prohibitive it will be illegal.

"SENATOR BANKHEAD. Now, you have not covered this point. At least this distinction has not been brought out. In the two cases you refer to as the direct taxing cases; one is on income; that is in the child labor case which undertakes to put a tax on income and uses the tax as a vehicle to prevent shipment in interstate commerce.

"That is not a property tax. This is not a direct levy on production. This is a sales or a processing tax which takes the proposition entirely without the rule in the cases that you have in mind. This tax is only collected on the sale of the cotton. It does not in any sense regulate production; it does in an indirect way control the amount of production, and it does in a way go to the method of collection.

"THE CHAIRMAN. Do you feel that the text is so worded that it is not apparent on the face of the bill that the tax is levied not for revenue but for the purpose of putting this tax so high that you can effectively control and regulate the production and interstate sales?

"SENATOR BANKHEAD. Of production, no.

"THE CHAIRMAN. Perhaps not directly, but it indirectly affects production.

"SENATOR BANKHEAD. I think it does affect production, indirectly. Now, here the tax is payable only in the event of sales of cotton. That brings it squarely within the oleomargarine case and the bank note case (the Veazie Bank v. Fenno (75 U. S. 533).

"THE CHAIRMAN. But the oleomargarine case is clearly distinguished. In that case the tax was not made to a point of making it prohibitive. It was levied to a point where it did produce revenue; it permitted the collection of revenue in considerable amount.

"SENATOR BANKHEAD. But it was not imposed as a tax for revenue only.

"THE CHAIRMAN. Well, in the last paragraph in the McCray case it is conceded the tax might be so high that it would be apparent that it was not intended for revenue and therefore it would be illegal. Therefore the revenue was one of the facts found in that case.

"I am not presenting these questions, you understand, to be captious, Senator.

"SENATOR BANKHEAD. I know.

"THE CHAIRMAN. I am simply trying to make the record as complete as possible.

"SENATOR BANKHEAD. I understand your motive, Mr. Chairman, and I am glad to have these questions raised."

P. 103."THE CHAIRMAN. Mr. Flannagan.

"MR. FLANNAGAN. I just want to see if I understood what you said. I understood you to say, Senator, that the taxing provision in the bill could not be construed as a tax to regulate or control production.

"SENATOR BANKHEAD. Not directly to control production; because it does not prohibit a sale. Any man can sell.

"MR. FLANNAGAN. He can sell.

"SENATOR BANKHEAD. Yes.

"MR. FLANNAGAN. But is not the primary purpose of this bill to regulate and control the production of cotton?

"SENATOR BANKHEAD. Yes, and personally I think that you could put a prohibitive tax on it as an article in interstate commerce.

"Let me read you a sentence from the oleomargarine case (195 U. S. 27):

> "'The Oleomargarine Act imposing a tax of one quarter of 1 cent on oleomargarine artificially colored any shade of yellow so as to look like butter and 10 cents a pound if so colored, levies an excise tax and is not unconstitutional as outside of the powers of Congress, or an interference with the powers reserved to the States, nor can the judiciary declare the tax void because it is too high or because it amounts to a destruction of the business of manufacturing oleomargarine, nor because it discriminates against oleomargarine and in favor of butter.'

Pp. 103-105. "THE CHAIRMAN. What is that decision?

"SENATOR BANKHEAD. That is the oleomargarine case, McCray v. United States.

"THE CHAIRMAN. But they also say in the last paragraph that the tax would be raised to a point where it would be prohibitive and thus unconstitutional.

"SENATOR BANKHEAD. The last paragraph in that decision?

"THE CHAIRMAN. The last paragraph in the McCray case.

"MR. FLANNAGAN. What is that citation?

"SENATOR BANKHEAD. This is from 195 U. S., McCray v. United States. At page 54 the court says:

> "'It is, however, argued that a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that because a particular department of the Government may exert its lawful powers with the object or motive of reaching

andend not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power whenever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the Government of its lawful powers is to be corrected by the abuse of its powers by another department.'

"THE CHAIRMAN. But in the last paragraph the court does point out that they had imposed a tax up to a place where it was prohibitory that it would be the exercise of an authority not conferred.

In the case of Hill v. Wallace it is stated:

"'The Constitution expressly limited the taxing power of Congress to certain purposes. It conferred on Congress the power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States.'

"and, 'That there is no warrant for saying that at any time the power to lay internal taxes had any other legitimate purposes than the raising of revenue'. And then they proceed to hold that it cannot be used for the purpose, when it is manifest, of regulation.

"Now, I was wondering in view of that decision and in view of the child labor tax case to which they refer, and in which they cite the Hammer v. Dagenhart case in which Congress enacted a law to prohibit transportation in interstate commerce of goods made at a factory, and in which the court says, in the child labor case:

"'In the case at bar, Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.'

"MR. FLANNAGAN. What case is that?

"MR. CHAIRMAN. That is the child labor case.

"SENATOR BANKHEAD. Yes.

"THE CHAIRMAN. That is the child labor case which was decided on May 15, 1922.

"MR. FLANNAGAN. What is the reference to that case?

"THE CHAIRMAN. The reference is 259 U. S. p. 20, known as the child labor tax case, and it is a more recent case than the one from which the Senator was reading. The other child labor case was decided in 195 U. S., and this case in 259 U. S. And so far as I am able to learn the Supreme Court of the United States has not rendered any more recent decision.

"SENATOR BANKHEAD. What was that case?

"THE CHAIRMAN. That is the child labor tax case.

"SENATOR BANKHEAD. In 259 U. S.?

"THE CHAIRMAN. 259 U. S. p. 20.

"SENATOR BANKHEAD. Yes; I have that here. That was an act to levy an income tax on the net income.

"THE CHAIRMAN. There was one that levied a tax of 2 per cent on certain types of articles and a quarter of a

cent on others. I believe this particular one levied 10 per cent on the entire net profits received.

"SENATOR BANKHEAD. Well, I consulted the legal department of the Agricultural Adjustment Administration when it was decided to put this method into the bill, and the lawyers wrote this provision which is included here.

"THE CHAIRMAN. Yes.

"SENATOR BANKHEAD. I also had the Attorney General send a lawyer down from his department and we conferred about it, and while I have no pride of opinion about it, I simply want to state that is how it was arrived at."

There are also tendered with this brief copies of pertinent Congressional Records covering some of the debates on the floors of the House and Senate.

In the issue of March 10, 1934, the Court's attention is directed to p. 4282, where Mr. Doxey, who was explaining the bill because of the indisposition of Chairman Jones, said:

> "If a bale of cotton above and beyond the allotment is raised there is a tax due on that bale. The purpose of this bill is not only to bring about more parity between production and consumption but is an effort to raise the price of cotton by limiting the production of cotton, and everyone who is a friend of the farmer will acknowledge this principle."

Also to p. 4282 where Mr. May questioned the constitutionality of the bill, and was referred to a brief on file in connection with this question. It will be stated for the information of the Court that we have access to this brief, and are furnishing copy of same with this brief. The authorities there cited will be fully discussed in this brief.

Also to the statement of Chairman Jones, on p. 4282, which reads as follows:

> "Mr. Jones. There are numerous instances of specific taxes, like the tax on ginning. We have levied a processing tax. The court has sustained a tax on bank note issues, a tax on oleomargarine, and on many other specific activities. These matters were gone into in the hearings. There is no question about the right to levy a tax. The only question that arose was whether we could go to the point at which the tax would become prohibitive, and that was the reason the committee cut the tax down from the point where it would probably have been prohibitive to the point where it would produce some revenue and thus be within the terms of the law."

Also to p. 4284, where Mr. Doxey said:

"The only way we know how to raise the price is to reduce and restrict production. I do not know how to restrict production except by the voluntary method that we are using, and that has certainly been wonderfully successful, in my humble judgment.

"Now, to supplement, aid, and assist that plan, we are limiting in this manner, for a brief period of time, our cotton production, I feel this method will be about as complete a program as we could hope to get under the circumstances, and I hope I am not wrong."

Also on p. 4284 to the following:

"Mr. Wadsworth. Mr. Chairman, will the gentleman yield?

"Mr. Doxey. I yield.

"Mr. Wadsworth. Has the gentleman given any thought to this: As I understand it and as he has explained this bill, the cotton farmer is forbidden or may be forbidden, by the Secretary of Agriculture to raise any other crop salable for cash on the acreage which is abandoned for the cultivation of cotton. Is not that right?

"Mr. Doxey: That he may not enter into serious competition with any other basic agricultural commodity.

"Mr. Wadsworth. That includes corn.

"Mr. Doxey. Certainly, and wheat also.

"Mr. Wadsworth. Would they raise wheat in your country anyway?

"Mr. Doxey. In our country we can raise most anything; but we will stick to cotton if you will help us, and if you do not help us, we shall be forced to go to something else."

Also on p. 4285 where Mr. Doxey said:

"Furthermore the principle of this Bankhead Bill is compulsion."

Also on p. 4286 where Mr. Doxey said:

"One of the purposes of this bill is to equalize existing inequalities; another is to safeguard a fair and just administration of its principles. It gives the Secretary of Agriculture wide discretion and broad powers in enforcing the program contained in this measure, as a supplement to the Agricultural Adjustment Act.

"Every bale that is tax exempt is to be identified as well as every bale upon which a tax must be paid is also identified by special 'Markings and tags'. Whenever a bale tag is secured, the tax is due, if it is not exempt cotton. The ginner is held responsible for the

tax. Who pays it is another question that remains to be seen when and if the measure is put into operation. We all have a right to our opinion."

Again on p. 4287 where he explained the purpose of the bill as follows:

"Its purpose is to place the cotton industry on a sound commercial basis, to prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce, to provide funds for paying additional benefits under the Agricultural Adjustment Act, to relieve the present acute economic emergency devoted to cotton production, to more effectively balance production and consumption of cotton, to raise the price of cotton by limiting the production thereof, and for other purposes.

"This bill is designed to supplement the cotton program of the Agricultural Adjustment Act and to make effective by preventing those who do not cooperate from destroying the present cotton program.

"Regardless of what objections that may be raised in this bill, our committee felt, and you all know, that if we do not raise more than 10,000,000 bales of cotton for any one year during the life of this bill there will be no necessity for putting the machinery provided herein into operation. In that event, no harm will be done by enacting this bill into a law as an emergency measure only. Much good will be accomplished by having it, so to speak, as a 'safety valve' in case the production of cotton exceeds the 10,000,000 bale mark and it is properly administered."

Again on p. 4288, where Mr. Marshall, speaking in opposition to the bill, said:

"In my opinion, the farmers of the United States will rise up en masse and protest against the principle of this bill, that it is a complete regimentation of agriculture.

"Now, this tax is, to my mind, absolutely a prohibitive tax. There will not be any revenue raised in taxes because of this law. There is no tax anticipated by the sponsors of the bill; there is no tax desired by the sponsors of the bill. If this bill in its operation should work out in that way to produce a tax, it will defeat the purpose of the bill. There will not be any tax, and the purpose of the bill is to control production of cotton.

"I am not going to deal in detail with the constitutional features of the bill, but I think if any court is called upon to pass on its constitutionality it will decide that you cannot control the production of cotton in this manner. This bill attempts, under the guise of a tax, to prohibit or control production.

Also on p. 4290, where Mr. Glover said:

"Mr. Glover. Mr. Chairman, during the last 10 days more attention and study has been given to the marketing of cotton than was ever given to it in the past by this Congress. The first bill on this subject was introduced in this session of Congress by Senator John Bankhead, of Alabama. Hearings were had on his bill before the Senate Committee and I attended as many of those hearings as I could.

"It was found that in as much as the bill carried a revenue feature that under the Constitution of the United States the bill would have to originate in the House. Senator Bankhead's brother, Hon. William B. Bankhead, introduced the bill in the House and it was referred to the Committee on Agriculture, of which I have the honor to be a member.

"The two brothers appeared before our committee in advocacy of the bill and stated that they were not wedded to the language of the bill so much as they were to the principle of control of orderly marketing.

"The President of the United States, Franklin D. Roosevelt, in a letter to our chairman, Hon. Marvin Jones, stated that he was for the principle of the Bankhead bill. His letter reads as follows:

'My dear Mr. Chairman: As you know, I have watched the cotton problem with the deepest attention during all these months. I believe that the gains which have been made--- and they are very substantial - must be consolidated, and, insofar as possible, made permanent. To do this, however, reasonable assurance of crop limitation must be obtained.

"In this objective the great majority of cotton farmers are in agreement. I am told that the present poll by the Department of Agriculture shows that at least 95 per cent of the replies are in favor of some form of control.

"My study of the various methods suggested leads me to believe that the Bankhead bills in principle best cover the situation. I hope that in the continuing emergency your committee can take action..

Sincerely yours,

Franklin D. Roosevelt.'"

Also on p. 4293, where Mr. McGugin, speaking in opposition to the bill, said:

"Now, let us come to this bill. Whereas in the beginning it was a voluntary program, and the individual, free-born, God-fearing cotton raiser of America could join such program if he wished to do so voluntarily, but when you pass this bill, what is the position of the cotton grower? He will either join and let the

Government dictate and control the use of his land or the Government will tax him out of existence. Boil it down and it is nothing less than legalized racketeering on the part of the Government to undertake to do indirectly what it has no right to do under the Constitution directly. Under the Constitution, the Congress of the United States has no more interest in a farm down in Texas than it has in a farm in England, but by this act, indirectly, Congress will exercise control over that farm in Texas, by using the power of taxation and saying to the man who operates that farm, 'You will produce what the Government at Washington tells you to produce, and if you produce more we will tax it and take it away from you'. That is an artful way of the Government of the United States exercising control and domination over real estate within the borders of the respective States.

"Mr. Bankhead: Will the gentleman yield?

"Mr. McGugin. No; I cannot yield now. I must finish.

"That is a power which is reserved to the States. My heart goes out to you southern Representatives from the Cotton Belt. I know the cotton producer is in distress, and he has been led to believe that this bill is going to give him a ray of hope. I do not believe that down in the bottom of his heart one Democratic Congressman in the South out of ten, really believes in the principles and precepts of this bill. I still believe that you Representatives from the great and gallant South still believe in the fundamental principles of the sovereignty of the States. I do not believe that you want to come here and make your States subservient to the Federal Government; however, in the political exigencies growing out of the depression, probably some of you think you must vote for this bill, but you will live to rue the day when you place the Southland under the domination of a Washington bureau."

Again on p. 4293, where he quite truly observed:

"It is said this bill is justified upon the ground that the tax cannot be applied unless there is a favorable referendum. I challenge the vote. It is not an honest vote. They tell us the Secretary of Agriculture has taken a referendum. All right; that is not an honest vote; it is not a fair vote. Why, one of the Democratic members of the Committee on Agriculture said it was a vote taken of 22,000 planters and that there were more than 22,000 cotton producers in his own district. There never will be an honest vote. This bill does not set up any machinery providing for an honest vote - just send out a mail-order referendum. If the time has come that we are going to operate government in the United States on the basis that the elected Representatives under the Constitution will abdicate, delegate their authority to the Secretary of Agriculture and tell him to act upon a mail-order referendum, then the time has come when the dignity

of the great democracy of the United States has sunk far lower than our forefathers ever expected it to sink. If you believe in this, stand up here like legislators under the Constitution and vote today for the tax that you want to levy. The idea of transferring the taxing functions of the Government from the Congress to the Secretary of Agriculture, with him instructed to exercise it upon a mail-order referendum! That kind of government does not rise to the dignity of idiocy, to say nothing about the dignity of common sense."

Also on p. 4295, where Mr. Whittington said:

"I advocate the passage of this bill because I believe there must be compulsory control."

Again on p. 4296, where he seeks to justify this bill on the ground that it is an emergency measure, and says:

"I am glad to answer the question. I do not want to evade, and I wish I had the time to discuss, the legal phases of the legislation. I would be glad to discuss the constitutional provisions, as I say, if I had the time, but I make this statement with respect to the so called Child Labor cases. There were two of them. One was declared to be unconstitutional by the Supreme Court of the United States because it undertook to regulate the intrastate business of manufacturing concerns employing child labor (247 U. S. 251). The other was declared to be unconstitutional because the Supreme Court of the United States held that the tax was prohibitive; that it was a penalty in the name of a tax, and thus void (259 U. S. 39). There was no emergency. Probably the most important phase of the legal feature involved in this act is that we are in the midst of an emergency - an emergency that has provoked the N. R. A. Oh, yes, gentlemen on the Republican side may smile, but in my judgment we are in a lot better condition now than we were in 1930-32. We may have made failures, but to err is human. We are in an emergency, I repeat. This legislation is limited to the period of the emergency, and in and of itself it does not involve the expenditure of very much Federal funds because the taxes are to be collected by existing agencies, and if there be no large amount of taxes collected, there will be no material additional expenditures from the Public Treasury, in as much as, under the terms of this act, practically all expenditures would be in the collection of taxes."

Also on p. 4296, where Mr. Christianson says:

"Mr. CHRISTIANSON. I do not think the gentleman has answered the question, because it is conceivable, of

course, that the manufacture of cotton and the employment of child labor in the manufacture of cotton are intrastate to the extent that those acts occur within the State, but so is the growing of cotton, and I do not see how the gentleman can distinguish between the right to apply the power of taxes to control the growing of cotton, when the Supreme Court has distinctly said it cannot use it for the purpose of preventing child labor in the manufacture of cotton."

Also on p. 4299, where Mr. Wadsworth, speaking in opposition to the bill, said:

"I confess that I am surprised at how quickly its sponsors, including the President of the United States, justified my prophecy. Now we know, through the utterance of the President himself, that the N. R. A., transforming all of our theories of government in a fundamental way, if its sponsors have their way about it, shall become the permanent policy of the United States. At the same time they are proceeding along parallel lines in the control of agriculture seeking to attain the same goal.

"This bill before us today is but a preliminary skirmish, in my judgment, in advance of the great battle that will come when A. A. A. expires by limitation in accordance with the provisions of that particular act. So in May or April of 1935, when these two measures are about to expire, we know that the President of the United States will attempt to lead this country into the adoption of both of them and the philosophies underlying them, as the permanent policy of the United States.

"Mr. Blanchard. Mr. Chairman, will the gentleman yield?

"Mr. Wadsworth. Yes.

"Mr. Blanchard. This measure here provides for extension into 1936.

"Mr. Wadsworth. Oh, yes. Emphasis has been placed by some of the supporters of this bill, on the contention that it is merely temporary in character. I hope we shall not delude ourselves into having any confidence in that assertion. That assurance was given us with respect to the National Industrial Recovery Act. It was given us with respect to the Agricultural Adjustment Act. This is not intended to be temporary. The men who believe in this kind of thing are in control of the Government of the United States in its executive departments, and scarce a day goes by but they endeavor to persuade the people that their philosophy is to be the saving of this country, and that it must be adopted permanently. Step by step we have seen them making progress. Here a temporary measure, there a permanent one. Then again a temporary measure, with assurance that it will expire after a little time; but we must judge these things in accordance

with the trend and in accordance with the well-known convictions of the men who are running the executive branches of the Government supported as they have been up to this point by an overwhelming majority of the members of the Democratic Party in both Houses of Congress."

Again on p. 4301, where he said:

"Mr. Wadsworth. I must finish. I would rather not. We are running up against the same kind of thing in this effort to control and regiment people as we ran up against in the matter of the eighteenth amendment. This bill will bring that same kind of thing, only this goes further, because this is not voluntary. This is compulsion. I am not surprised at the introduction of this bill. Compulsion must inevitably be resorted to by a government that attempts such a thing as this administration or any other government attempts along these same lines. First, the invitation to volunteer. Then if it is not successful there is compulsion, confiscatory taxation and, finally, criminal prosecution and jail sentences. The N. R. A. has already come to that. The voluntary day of the N. R. A. has gone. The President himself says that from now on the penalties of the law are going to be imposed, and General Johnson stands ready to crack down on any man who ventures to disobey a code, which has the force of United States law.

"Now, if these acts in the field of agriculture or in the field of industry bore with them any taint or element of moral turpitude, then the forbidding of them and the infliction of suitable penalties could be successfully carried out."

And again on the same page, where he said:

"This bill is but one step; there will be others, if not in this session in the next session. This parade has started. It is under the command of the President. Do not charge all the responsibility to Professor Tugwell, to Professor Moley, or to Professor Mordecai Ezekiel, or to any of the so-called 'brain trust', the leader of the movement is the President of the United States. He believes in it sincerely and deeply; it is his program; he supports this bill by his own letter.

"My attempt upon this occasion is to portray to you, if I can, the significance and the philosophy of this whole movement. It seeks the abandonment of the American conception of liberty under a Constitution. It challenges the tenth amendment by putting the Federal Government in the possession of complete authority over those matters which that amendment reserves to the States and the people. It spells the end of the Federal Union of States. It sets up a Government imperial in character, ruled by

a huge bureaucracy. Our children will exist as subjects in a land where their forefathers have lived as masters. Yes; pass this bill, drive in nail after nail, clamp the lid down permanently, my friends, but do not shut your eyes to the consequences."

The Court's attention is also directed to the issue of March 12, 1934, where the Honorable Geo. B. Terrell, former Commissioner of Agriculture for the State of Texas speaking in opposition of the bill, on p. 4438, said:

"I want you to understand that this bill proposes to regulate the marketing of cotton in interstate and foreign commerce, when its sole object is to control production. It undertakes to do that by a tax on cotton. The advocates of the bill frankly say there will be no tax collected. They do not intend to collect any tax, but they intend to control the production of cotton in the States.

"The Federal Government has no right to control the production of cotton in any State in the Union. If it can control the production of cotton, it can control the production of all other products.

"North Carolina, for instance, manufactures more cotton than she produces. Do you think that, if North Carolina wants to manufacture her cotton in her factories, the Federal Government can go in there and put a tax on cotton in order to limit production? If they cannot tax cotton in North Carolina, how can they tax it in any other States?

"The gentleman from Minnesota (Mr. Christianson) a while ago, asked a question about the decision of the Supreme Court in the child-labor case. The question was not answered, except in an evasive manner. The fact is the court held in that decision that the Congress could not do indirectly that which it could not do directly, and that the tax was a subterfuge, and they rightfully declared it unconstitutional.

"This tax is a subterfuge and a scheme to get around the plain letter of the Constitution. Let me show you how they are trying to get around it in another way. Realizing the weakness of the argument they make, this is what they write into the bill: 'It is prima facie presumed that all cotton, and its processed products, will move in interstate or foreign commerce.'

"They are going to write that into the bill to make it legal. Prima facie they presume it is moved in interstate and foreign commerce, when they know it is not all going that way. Every state in the Union has some factories, one or more, and they will manufacture some of that cotton. The cotton manufactured in the State where it is grown will not go into interstate or foreign commerce. Men who sell directly to the cotton mills in their State, could double, or quadruple,

their production, and a Federal law could not legally reach them. Thousands of tons of cottonseed and cottonseed meal are fed to livestock in the State where it is produced, and do not go into interstate commerce. Therefore, a Federal law could not legally control these products. This is nothing in the world but a subterfuge to try to violate the Constitution and control individual rights, just because we have a little surplus cotton now."

The Court's attention is directed to the issue of March 13, 1934, where Chairman Jones, discussed the carry over of cotton for the past several years, and then says:

"If, through the medium of this bill, the carry over at the start of the new season can be reduced to a normal one of about 4,000,000 or 5,000,000 bales, it will be of very great help, regardless of whether the operation of the law is then continued."

Of particular significance is the form of questionnaire which Secretary Wallace sent out, and the text of it is quoted on p. 4528. This letter plainly shows the purpose of the Act to be the control of cotton production.

Also on p. 4530 Chairman Jones says that the Bankhead brothers are the authors of this bill, but adds the following significant comment:

"Of course the question of taxing excess production as a means of control has been long discussed."

Again on p. 4530 Chairman Jones says:

"This allots to the various people producing cotton their part. In order to see that they live up, not only to the letter of it, but the spirit of it, they have asked almost unanimously that we try a method that certainly will produce the results, if it is upheld by the courts; in other words, that a man be allotted not only on an acreage basis, but a baleage basis of cotton, and after he has produced his allotment, which he may produce without any tax at all, then he shall be taxed as much as 50 per cent of the excess production.

"This is fair. Everybody who is willing to go along with the program gets his part free and if he exceeds the program he pays a tax. Now, what could be fairer, than this?"

Also on p. 4532, where Mr. Hope says:

"Therefore this is not a question that concerns the cotton producing section alone, because if the

principle of this bill is right, then there is every reason to think that it will be and should be extended to cover every major agricultural commodity and we are going to be asked to enact legislation for the compulsory control of all agricultural commodities. For that reason I think every Member of this House is vitally interested in whether or not the bill is going to become a law."

Again on the same page, where he questions the existence of an emergency in the following language:

"This bill is being offered upon the theory that an emergency exists, an emergency in the production of cotton in this country, and I submit that going as far as this bill does we certainly are not justified in even considering it unless a most extreme emergency exists. But you have not heard in the course of debate on this bill, and the Committee on Agriculture did not hear in the course of rather extensive hearings which we conducted on the bill, any evidence to show that an emergency exists in the production of cotton. If this bill had come up a year ago or 2 years ago it might have been possible to produce some evidence to show the existence of an emergency in the cotton industry, but such is not the case at this time."

Again on p. 4534, where Mr. Hope points out that for 1935-1936 the question of the allotment is left entirely to the discretion of Secretary Wallace.

Also on p. 4535, where Mr. Fulmer says:

"Now, what is the purpose of this bill? We propose under this bill to do for farmers what they should do for themselves, but are unable to do because they are not organized.

"I may say to you, Mr. Chairman, I do not know anything about any other section of this country when it comes to organizing farmers, but, so far as the South is concerned, the cotton farmer has never been organized and never will be. In the words of Abraham Lincoln, it is the purpose of this bill to do for cotton farmers that which it is impossible for them to do for themselves.

"My friends, we are simply proposing under this bill largely to do just what the Government is doing under the N. R. A. to and for every other line of business, except we have taken into consideration more seriously in providing for the small farmer and the small tenant and the share cropper."

Again on p. 4536, where he says:

"In that overproduction will be taxed when sold, regardless of whether or not the bill is being operated,

there will be no incentive on the part of any farmer to overproduce. In the meantime, if a farmer had a short crop and failed to produce his allotment, the next year he could increase his production so as to take care of both years."

Also on p. 4537, where Mr. Polk Says:

"As a member of the Committee on Agriculture of the House of Representatives, I listened to practically all of the testimony presented to our committee with reference to this cotton control bill."

Again on p. 4538, Mr. Polk says:

"The essential principle contained in this legislation is an effort to force the production of a definitely specified amount of cotton by means of a tax which must be paid on each pound of cotton ginned in excess of the quota assigned. This tax is levied only, as stated in the bill on page 3, section 3, when the persons who 'own, rent, share crop, or control two thirds of the land in the United States on which cotton is produced', favor the levying of such a tax. In other words, this bill becomes operative if and when the cotton farmers who control two thirds of the cotton acreage in the United States want it. It forces the minority to agree to the wishes of the majority. It forces those large landowners who will not cooperate with the present form of voluntary reduction as has been in operation during this past year to pay a tax on that part of their ginned cotton which is in excess of the quota."

Also on p. 4538, where Mr. Sandlin says:

"I am for this bill because those affected are practically unanimous for it. I am for it, because the only way in which production of cotton can be controlled is on the bale basis."

On p. 4539 Mr. Boileau explains how the provision on p. 32 of Regulations 84, providing that no producer could get exemption certificates unless he agreed to abide by the A. A. A., was put into the Act. He says:

"This bill, as originally drawn, did not meet with my approval. I felt I could not go along with the bill because it enabled the cotton farmers to reduce their acreage in cotton, and plant those idle acres in wheat or tobacco, or use it to pasture dairy cows or beef cattle, or to expand their production of other agricultural commodities. I felt that if the cotton farmers came here asking for relief, they should come with clean hands, and should be satisfied to have a provision incorporated

in the bill that would prohibit them from using that land to compete with farmers who are not getting benefits from the bill. I am pleased to say that the committee has accepted such an amendment, and that amendment is written in the bill in the shape of a committee amendment, and I assume there is no opposition on the part of those in favor of the bill and that that amendment will be adopted by the House."

It will be recalled that this is the provision the witness from Washington sought to explain away by saying it had not been enforced.

Again on p. 4539 Mr. Boileau says:

"Mr. Boileau. This bill goes to the point of making control compulsory; but it is my contention that with any kind of controlled production there must be some method of compulsion whether it be by direct mandate of law saying that if you produce more than your share you shall go to jail, or whether you compel the farmer, by artificially creating a situation that makes it compulsory for him to come in the program, by using good business judgment."

Again on p. 4540, we find the following:

"Mr. Hope. Is there not this difference in the two methods, however: While in both cases the Secretary makes an allotment to each farmer, under the voluntary method if a man is not satisfied with the allotment- and I may say from my own experience with the wheat allotment that about 50 per cent of the farmers are not satisfied- he does not have to take it but under the compulsory method the Secretary says 'You can grow 9 bales of cotton and no more unless you pay a prohibitive tax.' Is not that the difference between the voluntary method and the compulsory method?

"Mr. Boileau. The farmer can still produce as much as he wants to, but for such cotton as he sells above the quota he will receive only half price.

"Mr. Hope. Through the operation of a prohibitive tax.

"Mr. Boileau. That is the persuasion to which Mr. Johnson referred; that is the part that makes it so important from the standpoint of good business judgment for the farmer to come into the program and limit his production. There is a difference of method; yes; but there is not so much difference in principle. Through this method we are making it so inviting that the 'chisler' will be compelled to come in and cooperate with the rest of the farmers."

Also on p. 4543, Mr. Chase said:

"Mr. Chase. Mr. Chairman, ladies and gentlemen of the Committee, the question which overshadows all other questions pertaining to this innocent-appearing cotton bill is whether or not the Congress shall commit America to the principle of compulsory control of production.

"That question must be met, faced squarely, and answered by this House on this bill."

The Court's attention is also directed to the issue of March 15, 1934, where Mr. Tobey, speaking in opposition to the bill, on p. 4726, says:

"In my honest judgment, the condition of the cotton grower of the South will be worse if this bill goes into effect than it was before. The legislation, if adopted, will constitute a radical departure from the existing order. Its effect will be to apply compulsory control of production to a great basic commodity and will eliminate the freedom of action which has always been an attribute of American citizenship. If this bill should pass, it would follow very naturally that similar control will be asked for all agricultural commodities, and as a corollary there would be suggested or attempted limitation of production of output of all other industries with applied control of production of agriculture and industry. We would become very nearly a sovietized United States.

"This legislation is so far-reaching, such a transition from the order under which the Nation has grown from an infant in swaddling clothes to its present leadership, that we should hesitate to give it our approval. It will be a sad day for the people of the United States when a centralized government, a bureaucracy, is empowered to tell you and me as individual farmers or manufacturers the amount which we can produce. If that day comes, it will sound the death knell of the initiative, the energy, and the enterprise which have been our outstanding characteristics."

Also on p. 4728 Mr. Fish says:

"May I say that there is no bill in Congress that will do more to relieve and prevent child labor than this control bill."

Also on p. 4729, where Chairman Jones, speaking of the tax, says:

"Mr. Jones. Let me state to the gentlemen that the part that will be taxed will be but a very small part, we hope, of the visible supply or the carry-over. We hope that the 10,000,000 bales, in large measure, will account for the carry-over that is left in this country. The tax is for the purpose of letting the farmer who is not in the program and the farmer within the program

who is disposed to use excessive fertilizer know that they will not accomplish anything by so doing. The carry-over that arises from the excess production will be very small if this bill is passed."

Also on p. 4730, where Mr. Truax says:

"I am not censuring these gentlemen or criticizing the A. A. A. for some of its actions and procedure, but this bill is designed to remedy the very defects that they mention, to plug up the holes they are complaining about. The program of the A. A. A. is voluntary. It has worked eminently well and satisfactorily with the cotton producer last year, but with this huge surplus, a year's supply on hand, in order that they may hold the price where it is, it is absolutely necessary that the amount that moves to market, not the amount that is produced on the farms, be controlled and limited to a point which, in their judgment, represents a maximum of 10,000,000 bales."

Also on p. 4734, where Mr. Hastings says:

"This bill is temporary and experimental. After this year the Secretary of Agriculture must find that two thirds of the cotton farmers favor it. It continues for 2 years, and the President may extend it another year. It limits the amount of cotton that may be produced without a tax, and prorates that to States and counties, and finally to individual farmers. It gives the Secretary of Agriculture broad powers. Finally it places a heavy tax of 50 percent on the production in excess of the amount allowed. Congress passed the Agricultural Adjustment Act last year which provided for a voluntary reduction in the acreage planted to cotton. This bill provides for a compulsory reduction through an excise tax upon excess production. It fixes the maximum that may be produced, free of tax, for the 1934 season at 10,000,000 bales of cotton. It is estimated there are between ten and eleven million bales of carry-over cotton. There is therefore a real necessity for keeping the production of cotton down."

Also on p. 4735, where Mr. Snell says:

"Mr. Chairman, I do not intend to make any extended remarks in regard to this legislation, because I am not sufficiently acquainted with the details of the bill or with the production, manufacture, and sale of cotton. On the other hand, I do not believe that I would be doing my duty as a Representative if I did not at this time protest against the fundamental principle of compulsion carried in this bill. In my judgment, this is entirely un-American in every respect and against every fundamental principle of the right of man to do with his own property what he sees fit provided he does no harm to his neighbor. This has been one of the boasted American liberties from the

very beginning of our Government, and I am absolutely opposed to destroying or in any way abridging that principle.

"As far as cotton itself is concerned, I am as friendly to that as I am to any other agricultural product; but my fear is that this is a part of a well-designed plan not only to apply this principle to cotton, but in turn, step by step, to apply it to every other agricultural product and eventually to industrial products. It is another one of the carefully devised and concealed plans of the present administration to drive us directly into a collective state; and I am opposed to that and shall oppose that principle in any legislation that comes before us for consideration."

Also on p. 4741 is found the following:

"Mr. Bankhead. The gentleman talks a good deal about penalties. I believe I asked this question before of the gentleman. The gentleman must know that in order to make a bill of this sort effective, it must carry the ordinary and usual penalty provisions to secure its enforcement. These are not unusual regulations of unusual penalties, and I dare say that practically all bills affecting agriculture, and we have had a lot of them coming out, undertaking to give power to issue regulations, have carried penalties of a nature exactly similar to this. It is the ordinary and usual procedure for the enforcement of legislation.

"Mr. Hope. I think if the gentleman is going to enforce this legislation and compel the cotton farmers of the South to conform to it, he is going to have these penalties, and he is going to have to apply them in a great many cases. That is exactly what you are up against when you start to enforce a drastic piece of legislation like this. Certainly you will have to have these penalties which go so far as to provide that a man shall go to jail or pay a large fine if he violates not only the law but the regulations of the Secretary of Agriculture or if he hauls his cotton across a county line or does any of a hundred other things which he might innocently do and still violate the provisions of this act."

The Court's attention is also directed to the issue of March 16, 1934, on p. 4802, where Mr. Rankin says:

"Mr. Rankin. Mr. Chairman, I rise in opposition to the amendment. The gentleman from Texas (Mr. Jones) evidently has not studied the amendment. This is not an acreage reduction bill. It is a bale reduction bill. No man can plant any cotton, produce it, and sell it unless he is issued one of these certificates; and if he is issued one of these certificates, it gives somebody in the Department of Agriculture complete jurisdiction over his land as to what he shall plant upon it.

"Let us see what it does. Here is a man, say, who has not signed up. By this you force that man to either come in under this act or not plant any cotton. If he plants one seed of cotton, then before he can sell a bale, the representatives of the Agriculture Department can come in and say what he may raise on the rest of his land. I will tell you what they are getting at and what the object of this is. It is to stop the development of the dairy industry in the South."

Also on p. 4803, where Mr. Hope says:

"Mr. Chairman, this amendment must remain in the bill if we are to protect the producers of other crops in this country. Yet, at the same time the gentleman from Mississippi (Mr. Rankin) is absolutely right in what he says, as to what the effect of the amendment will be. There is a difference in the effect of a violation of a voluntary contract and what will happen to a man if he violates any regulation which the Secretary may make under this provision of the bill, because the contract simply provides that if a man violates it, that is ground for cancelation.

"The Secretary can cancel the agreement and compel the man to repay any benefit payments he has received; but under this legislation the Secretary can make any regulations he desires to compel the producer who gets a certificate of examption to comply with the crop-reduction program, and if the man violates the regulations, then he is subject to a $5,000.00 fine or 2 years' imprisonment. This is the difference between the two proposals.

"Now, I do say that if you are going to pass this legislation, this provision must stay in if you are going to protect the producers of other crops; and the provision itself is certainly an illustration of the difficulties that you get into when you try to pass legislation like this.

"Fears have been expressed by myself and others that eventually the attempt will be made to apply similar legislation to all crops; and this illustrates what is likely to happen, for without passing any other legislation you are going to apply what amounts to compulsion to the production of all crops that may be grown in the cotton section of the country. If you are going to limit the expansion of dairying in the South by law, then, sooner or later you will be compelled to limit by law the expansion of dairying in the North. So, as I say, this is the best illustration I can think of to show what we are getting into when we start passing legislation of this kind.

"I hope the amendment will not be stricken out; for it must stay in if we are to protect the producers of other commodities; but if it does stay in, some of you are going to face rather embarrassing situations when you go back to your districts."

Also on p. 4804, where Mr. Busby says:

"May I say that I come fromthe State of Mississippi, which used to be the greatest cotton-producing State in the country. I see in this bill a confiscation of the rights of the people, of the property of the people, and of the use of that property which the people have bought with their own labor and their own sweet and which they are now about to turn over to the Secretary of Agriculture under the direction of the gentleman from Iowa and others who take the same view of what is best for us that he does. I do not think it is necessary to drift into this type of insinuation and accusation."

Also on p. 4805, where Mr. Jones says:

"Mr. Jones. The gentleman and his colleagues, who are good friends of mine and for whom I have high regard, have simply misconstrued this amendment. There is no criminal penalty attached to this amendment. It simply says that 'no certificate of exemption shall be issued and no allotment shall be made to any producer unless he agrees to comply with such conditions and limitations', and so forth, as to the expansion of his program. This is all. It simply means he cannot get his exemption certificates unless he agrees to the conditions laid down by the Secretary. The penalty provision is in an entirely different part of the bill and applies only in the event a man violates the regulations issued by the Secretary of Agriculture."

Also on p. 4806, where Mr. Brown says:

"This amendment seeks not only to reduce cotton production but provides for a compulsory restriction of other crops in land taken out of cotton production, with a penalty if not complied with. Therefore I question the enforcement of this particular amendment. I am certainly opposed to any law which cannot be enforced."

The Court will doubtless read, with interest, the speech of the Honorable Wm. B. Bankhead on pp. 4818-4821. If there is any mention of revenue anywhere in that speech we have failed to discover it.

Also the speech of Honorable Geo. B. Terrell, on pp. 4822-4824.

The issue of March 17, 1934, is tendered, and the Court's attention is directed to p. 4828, p. 4834, p. 4836, and p. 4837.

The issue of March 21, 1934, is tendered, and the Court's attention is directed to the speech of J. R. Mitchell on pp. 5175-5177.

The issue of March 24, 1934, is tendered, and the Court's attention is directed to the speech of Mr. John E. Rankin on pp. 5501-5503.

Turning to the proceedings in the Senate, the issue of March 24, 1934, is tendered, and on p. 5428 Senator Bankhead says:

> "The object sought to be accomplished by this bill is to make definite and certain a reduction in the present abnormal and price-depressing surplus or carry-over of cotton. We are seeking, if possible, to bring the price of our money commodity - practically the only money commodity produced in the South - to a fair exchange value with other commodities. The fair exchange value or parity at present would be about 15 cents a pound."

On p. 5430 he again says:

> "Mr. President, the purpose of the bill is to limit the number of bales that may be sold in the market free from the payment of the tax."
>
> "Mr. King. As I understand the Senator - if he will pardon me for a further question - his effort is to destroy production above 10,000,000 bales, and destroy it by invoking the taxing power of the Government?
>
> "Mr. Bankhead. I am not trying to destroy it. I am trying to discourage people from entering upon the production of it."

Of particular importance is the following on page 5435:

> "Mr. Bailey. If the cost of production is now 11 cents, and the tax is 50 percent upon the pound, that would be a tax of 5 1/2 cents on the pound, would it not? I ask the Senator would that not suppress the production of cotton in excess of 10,000,000 bales, and is that not the primary object of this proposed legislation?
>
> "Mr. Bankhead. The primary purpose, of course, is to discourage the production of more cotton than the 10,000,000 bales.
>
> "Mr. Bailey. And to make it financially impossible by imposing a tax that is equal to half the cost of production?
>
> "Mr. Bankhead. I do not base it on cost of production at all. I do not think that is an element that enters into the question. I think it is the same proposition that industrialists engage in of disposing of their surplus somewhere.

"Mr. Bailey. I wish the Senator would come down and make it very plain now. Is not the purpose of this proposed legislation to suppress the production of cotton in excess of 10,000,000 bales a year?

"Mr. Bankhead. No; it is to prevent the sale of it without paying the tax.

"Mr. Baily. If the Senator prevents a man from selling a thing, if that man is not entirely crazy, he certainly will not produce it; is that not so?

"Mr. Bankhead. Of course, the Senator knows that we hope that no more than 10,000,000 bales of cotton will reach the market.

"Mr. Bailey. And that is the objective to be accomplished by this proposed legislation, and if that does not justify the legislation, nothing else will; is that not so?

"Mr. Smith. Yes.

"Mr. Bailey. The Senator from Alabama has the floor. I am glad to have the testimony of the Senator from South Carolina (Mr. Smith). Let that go in the record. The Senator from South Carolina said in answer to my question, 'Yes'. What does the Senator from Alabama say?

"Mr. Bankhead. I think it will help, whether we limit it to 10,000,000 bales or they have slightly more.

"Mr. Bailey. That is not answering the question. I do not wish undulyto press my friend, but I believe I will ask him once more: Can this bill be justified on any theory other than the theory that it will restrain the farmers who produce cotton from producing in excess of 10,000,000 bales of cotton during the coming year?

"Mr. Bankhead. I am afraid it will produce too much revenue, I will say to the Senator.

"Mr. Bailey. That is not an answer to my question. I should like to have the Senator answer the question.

"Mr. Bankhead. I have answered it.

"Mr. Bailey. What is the answer, please?

"Mr. Bankhead. I said I was afraid it would produce too much revenue. There would be too much cotton sold at 50 percent.

"Mr. Bailey. Does the Senator consider that an answer to my question?

"Mr. Bankhead. Yes.

"Mr. Bailey. I have aksed the Senator what will be the effect of this proposed legislation, and he tells me he is afraid it will produce too much revenue. I submit that does not answer my question."

And on p. 5437:

"Mr. Vandenberg. In seeking to close the back doors and the side doors, if there be any - let me put it that way - does the Senator from Alabama think that the tax proposed in the bill will be effective, or will there be sales in spite of the tax?

"Mr. Bankhead. I am going to offer an amendment to

increase the amount of the tax, and I hope the Senator will help me make it more effective.

"Mr. Vandenberg. So that if possible there will be no sales as a result?

"Mr. Bankhead. That is what I ask.

"Mr. Overton. Mr. President, will the Senator from Alabama yield?

"The Presiding Officer. Does the Senator from Alabama yield to the Senator from Louisiana?

"Mr. Bankhead. I yield.

"Mr. Overton. The Senator stated a moment ago that he intends to offer an amendment to increase the tax. May I say that I have received quite a number of telegrams from Louisiana suggesting that the tax should be increased in order to effectuate the purpose of the bill. I am very glad the Senator is going to offer that kind of an amendment.

"Mr. Bankhead. I have a committee amendment on that point. We have all agreed to it. We are going to make the bill effective if we can possibly do so. We have an amendment increasing the tax to 75 percent."

Also on p. 5439 Senator Fess says:

"As I have previously stated, I know of no passion that is stronger than the feeling that leads one to say, 'This is mine. It is not only mine to hold but it is mine to convey if I want to, without any interference with that right, not only that the property is mine to do as I want to do with but that it is mine to sow when I want to, and with what I want to, and to the extent I desire, without having to come to Washington for permission before I do it."

Also on p. 5534 Senator Borah says:

"I can find no possible justification for the exercise of the taxing power to keep out of trade a legitimate subject of commerce. <u>It is not imposing a tax for revenue, it is assessing a fine under the guise of a tax</u>.

"What happens? The taxes are laid as a result of a popular vote, as it were. We are not levying the tax ourselves. <u>We are giving the Secretary of Agriculture the power to levy the tax</u>.

"When a man has a certain number of bales of cotton which may go into interstate commerce, and we find that he has a bale of cotton that may not go into interstate commerce, we tax him 50 percent of the value of the product, is that a fine? <u>Is that a punishment or is that a tax? Is it laid for the purpose of collecting revenue, or is it laid for the purpose of punishing a man for exercising his legitimate rights and pursuing a legitimate industry?</u>"

Having analyzed the Act itself from the standpoint of being a revenue measure, and having set forth the light in which it was regarded by the various members of Congress at the time it was under consideration, we come to a treatment of the law of this phase of the case.

Does the Bankhead Act Provide for a Tax?

In New Jersey v. Anderson, 203 U. S. 486, 51 L. Ed. 284, the Court said:

> "Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government."

In Houck v. Little River Drainage District, 239 U. S. 254, 60 L. Ed. 266, the Court said:

> "A tax is an enforced contribution for the payment of public expense."

In U. S. v. One Ford Coupe Automobile, 272 U. S. 321, 71 L. Ed. 279, the Court said:

> "It is true that the use of the word 'tax' in imposing a financial burden does not prove conclusively that the burden imposed is a tax; and that when it appears from its very nature that the imposition prescribed is a penalty solely, it must be treated in law as such."

In U. S. v. La France, 282 U. S. 568, 75 L. Ed. 551, the Court said:

> "No mere exercise of the art of lexicography can alter the essential nature of an act or thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such."

Looking at the Bankhead Act itself, it will be seen that it is expressly provided that the revenue, if any, produced by this Act is to be used by the Secretary of Agriculture to carry on the cotton program of the Agricultural Adjustment Act, and to pay additional benefits thereunder.

It cannot be successfully argued that the cotton program thus referred to is a public purpose. On the contrary, it is plainly a paternalistic piece of legislation whereby the government pays out doles to certain classes of persons affected by its terms in exchange for the foregoing by such persons of some act which they would otherwise be privileged to perform.

legislature by a city for the purpose of lending the same to persons engaged in manufacturing and for assisting in developing industries, was held void as not being for a public purpose. The Court said:

> "Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person."

In the case of Dodge v. Mission Township, C. C. A. 8th Circuit, 107 Fed. 827, the legislature of the State of Kansas passed an act authorizing cities or townships to encourage the erection of mills and the manufacture of sugar and syrup out of sorghum cane by subscribing stock in sugar factories and to vote bonds to pay the subscription price for any stock so subscribed for an to levy taxes to pay the principal and interest of the bonds. The Court says, speaking through Walter H. Sanborn, Circuit Judge:

> "It is a fundamental principle of a republican form of governmnet that no man shall be involuntarily deprived of his life, liberty, or property, without due process of law. The prohibition of such a deprivation by the states is found in the fourteenth amendment to the Constitution of the United States. But it lies deeper, and limits and conditions every grant of legislative, executive, or judicial authority. The proposition was announced in the early history of the republic, and it has been constantly affirmed. The Supreme Court said in Calder v. Bull, 3 Dall. 386, 388, 1 L. Ed. 648, 649:
>
> 'A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A, and gives it to B, - it is against all reason and justice for a people to instrust a legislature with such powers, and therefore it cannot be presumed that they have done it.'
>
> "A legislative act which takes, or undertakes to authorize the taking, of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislature of the states, and is without legal force or effect. The legislative power of taxation and power of eminent domain are

alike limited to the exercise thereof for public objects, and they cannot be successfully prostituted for private purposes. For the same reasons the power of a legislature to create or to authorize the creation of a public debt, and the issue of public bonds to be paid by taxation, is subject to the same limitation. The clear and forcible declarations of Chief Justice Black in 1853 in Sharpless v. Mayor, etc. of Philadelphia, 21 Pa. 147, 169, have long since become the settled law of the land. He said:

'Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the asembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them.'

"See, also, Cole v. City of La Grange, 113 U. S. 1, 6, 5 Sup. Ct. 416, 28 L. Ed. 896.

"A necessary corollary to these propositions is that a legislature, which has no power to authorize the levy of a tax or the creation of a public debt for a private purpose, has no power to draw that authority to itself, or to create it by its mere declaration that a private purpose is a public one. Any other theory would destroy the limitation. A legislature cannot make a private purpose a public one by its mere fiat, and the determination of the question in any case whether or not a given object is public, or private is a judicial, and is not a legislative, function."

And again:

"The question, then, is whether or not the construction and maintenance of factories owned by private corporations to manufacture sugar and syrup from sorghum cane is a public or a private purpose. The true answer to the question seems to be plain and certain. Speaking generally, a public purpose is a governmental purpose, one of the purposes for which governments are instituted and maintained

among men, such as the maintenance of order, the prevention and punishment of crime, the care of highways, the relief of the destitute, the education of youth, the erection of buildings for the use of schools and of the officers of the government; while a private object is one which is ordinarily sought and attained by individuals or private associations of individuals, such as the cultivation of the soil, the manufacture of useful and attractive articles, the purchase and sale of merchandise, and the thousand and one purposes which enlist individual enterprise and energy in a complex and advancing civilization. There seems to be no doubt in which category the promotion of the construction and maintenance of sugar factories falls."

And again:

"The sugar factory, to aid in the construction of which these bonds were issued, was not to be constructed or operated by the township or its officers, but by private owners. The officers of the township were to have no control or direction of its management. It was not to be erected to perform, or to assist in the performance of, any function of government. All propserous mercantile and manufacturing enterprises in a town tend to enhance the value of property, to employ labor, and to increase business. The fact that the construction and operation of this mill would have a similar effect in no way differentiates the purposes or object of its promotion from that of the promotion of other private business undertakings. If this attempt to promote the manufacture of sugar by taxation is to be sustained, every holder of property in this township must contribute a portion of that property to pay for the erection and operation of this mill. For what purpose must he make this contribution? Not to sustain the government, but to build a mill for private owners, in which they may conduct their own private business. Who receives the proceeds of these bonds? Or, in other words, to whom does the taxpayer really pay his tax? Not to the salaried officers of the government, not to the teachers of the children in the public schools, but to the private individuals who own the mills. For whose benefit does he contribute this share of his property? For the direct benefit of the owners of the mill alone, and perhaps for the indirect benefit of those farmers who contract with these owners before they plant their cane for its manufacture into sugar or syrup. When these facts are studiously considered, all doubt of the character of this promotion vanishes. The aid of the construction and operation of this mill

actually serves but two purposes. It serves to enable the owners of the mill to gain the legitimate profits of their undertaking, and it serves to take by taxation from the owners of the property in the township a portion of that property and to give it to the owners of the mill or to the promoters of the scheme for their private use. Neither of these objects is a public purpose. Neither of them is a purpose for which taxes can be lawfully levied, or for which municipal bonds may be legally issued. Our conclusion is that the promotion of the construction and operation of a mill for the manufacture of sorghum cane into sugar and syrup is not a public purpose. Township bonds issued for that purpose, and the act of the legislature which authorizes their issue, are alike beyond the powers of the legislature and of the township, and are void."

In the case of St. Paul, Trust & Savings Bank v. American Clearing Co., 291 Fed. 212, the Court said:

"Always the fundamental principle has been recognized that the power of taxation can only be used in aid of a public object, that is an object which is within the purpose for which governments are established; and such power cannot be exercised in aid of enterprises strictly private, for the benefit of individuals, though in some remote or incidental collateral way the local public may be benefited thereby."

Is the Bankhead Act an attempt, Under the Guise of a Tax, to Regulate Cotton?

To clearly demonstrate that the above question must be answered in the affirmative, it is only necessary to discuss a few cases.

In Bailey v. Drexel Furniture Co., 259 U. S. 20, 66 L. Ed. 817, the Court had under consideration the attempt upon the part of Congress to impose "an excise tax equivalent to 10 percentum of the entire net profits for the year" upon any one who wilfully employed in his plant a child below the prohibited age. The law was attacked as being unconstitutional, and Mr. Chief Justice Taft, after setting forth certain provisions of the Act, disposes of the case in language that is so pertinent to this case, that we shall be compelled to quote from it extensively: Chief Justice Taft says:

"The law is attacked on the ground that it is a regulation of the employment of child labor in the states, - an exclusively state function under the Federal Constitution and within the reservations of the 10th Amendment. It is defended on the ground that it is a mere

excise tax, levied by the Congress of the United States under its broad power of taxation conferred by Sec. 8, article 1, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted, under previous decisions of this court, to infer, solely from its heavy burden, that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in busines. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years; and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the government one tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that the payment is to be exacted. Scienters are associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor, and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

"It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require

us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from the breaking down of recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

"Out of a proper respect for the acts of a coordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

"The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial; but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter

result by adopting the criteria of wrongdoing, and imposing its principal consequence on those who transgress its standard.

"The case before us cannot be distinguished from that of Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 784. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:

'In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, - a purely state authority.'

"In the case at the bar, Congress, in the name of a tax which, on the face of the act, is a penalty, seeks to do the same thing, and the effect must be equally futile.

"The analogy of the Dagenhart Case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state, in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of state concerns, and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. This case requires, as did the Dagenhart Case, the application of the principle announced by Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. Ed. 579, 605, in a much quoted passage:

'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its power, pass laws for the accomplishment of objects not intrusted to the government, it would become the

painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.'"

We shall interrupt this opinion here for the purpose of applying the above quoted portion to the facts of this case.

We accept the test announced by the Court that the law must be construed, and the purpose and intent of Congress, must be determined by the language used. Using such guide, "Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so called tax as a penalty?"

When the language of the Act is looked to it is seen that the occasion for the law is the "economic emergency". No attempt is made to define the emergency, but a reference to the proceedings, both in the committee hearings and on the floor, shows that it referred to the abnormal carry over of cotton. This has to do with regulation, not revenue.

As has already been pointed out, the purpose of the Act, as expressed in the policy of Congress, is clearly to regulate the cotton industry.

As was pointed out in the Drexel Furniture Company case, the Secretary of Labor had many duties to perform under the Act, whereas normally his department was not concerned with the collection of taxes, so in this case the Secretary of Agriculture absolutely dominates the Bankhead Act although normally his department has no connection with the collection of revenue.

In the Drexel case it is pointed out that the Act undertakes to regulate the conduct of the business. In this case the regulation of the business of cotton is clearly apparent. Prior to the beginning of the 1935-1936 season the Secretary of Agriculture determines how much cotton will be needed to meet the market requirements, and then proceeds to allot the amount each individual farmer will be permitted to raise tax free. The farmer is then required to apply to the Secretary of Agriculture for exemption certificates, and may be refused same unless he agrees to abide by the regulations with regard to all his crops. After his certificates have been issued he is required to present them to the ginner each time he has a pound of cotton ginned, and have the ginned product properly tagged. As pointed out in the testimony, even if it is cotton to be used at home for quilting purposes it must be reported and tagged.

Another phase of the regulation is the ginning activities. Before the ginner can operate he must execute a bond, then he must apply to the Collector of Internal Revenue for bale tags, tagging certificates, and lien cards, for which he is charged until they are properly accounted for. Every

time he gins any cotton he must keep a complete history of it, and see that exemption certificates are surrendered, or the tax paid, before he relinquishes manual possession of the cotton. He must also report to the Collector once a month on all cotton ginned, and surrender certificates or tax money to cover every pound of it. Certainly all of this detailed regulation of the routine duties of both the farmer and the ginner can find no justification in a legitimate tax measure.

Then too the Act shows that the estimated market requirements for the particular crop year are exempt from the tax, and only the excess is attempted to be taxed. The severity of this tax upon such excess shows clearly that so called tax is a penalty for raising more than has been allotted.

It is to be observed that heavy penalties are provided, not for the failure to pay the tax, but for the failure to have the cotton tagged, reports made, and all other regulatory provisions.

The analogy between the two cases could be carried farther, but to borrow from Justice Taft's language:

> "In the light of these features of the Act (Bankhead Act) a court must be blind not to see that the so called tax is imposed to stop (the production of cotton over the allotted amount)".

Reverting to Justice Taft's opinion in the Drexel case, it will be observed that the remainder of the opinion is devoted to distinguishing prior decisions of the Supreme Court. The cases he distinguishes are Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482; McCray v. United States, 195 U. S. 27, 49 L. Ed. 78; Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. Ed. 389, and United States v. Doremus, 249 U. S. 86, 63 L. Ed. 493.

It has heretofore been noted that Senator Bankhead had a brief on the constitutionality of the Bankhead Act, and incorporated it in the Congressional Record for March 8, 1934. We have obtained, and tender with this brief, an exact copy of the brief relied upon by Senator Bankhead. In that brief, among the cases relied upon as sustaining the Bankhead Bill are McCray v. United States, supra; Veazie Bank v. Fenno, supra; and United States v. Doremus, supra. It would, therefore, be profitable to see What Chief Justice Taft has to say about those cases:

Speaking of the Veazie Bank case, he said:

> "The first of these is Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482. In that case, the validity of a law which increased a tax on the circulating

notes of persons and state banks from 1 per cent to 10 per cent was in question. The main question was whether this was a direct tax, to be apportioned among the several states 'according to their respective numbers'. This was answered in the negative. The second objection was stated by the court:

'It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.'

"To this the court answered:

'The first answer to this is that the judicial cannot prescribe to the legislative departments of the governments limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.'

"It will be observed that the sole objection to the tax here was its excessive character. Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate, and that was all. There were no elaborate specifications on the face of the act, as here, indicating the purpose to regulate matters of state concern and jurisdiction through an exaction so applied as to give it the qualities of a penalty for violation of law rather than a tax.

"It should be noted, too, that the court, speaking of the extent of the taxing power, used these cautionary words:

'There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself, It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the states, or if exercised for ends inconsistent with the limited grants of power in the Constitution.'

"But more than this, what was charged to be the object of the excessive tax was within the congressional authority, as appears from the second answer which the court gave to the objection. After having pointed out the legitimate means taken by Congress to secure a national medium of currency, the court said (p. 549):

> 'Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes, not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.'"

Our case can be distinguished from the Veazie Bank case on identically the same grounds as was the Drexel case, namely.

(1) In the Veazie case the only objection to the tax was its excessiveness. Such is not the sole objection here, but it is claimed that it is an interference with state control. Also that it is a penalty, and a subterfuge.

(2) In the Veazie case Congress had legislated on the subject of currency, and had the constitutional power to protect its legislation.

Here Congress has never legislated upon the question of cotton production.

(3) In the Veazie case Congress had the power to legislate on the subject matter.

Here Congress clearly has no power to legislate on the subject matter.

(4) In the Veazie Bank case the measure was a straight tax measure, with no regulatory features.

Here the tax is a subterfuge, and the Act is filled with regulatory provisions.

With regard to the McCray case, Chief Justice Taft said:

> "The next case is that of McCray v. United States, 195 U. S. 27; 48 L. Ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561. That, like the Veazie Bank Case, was the increase of an excise tax upon a subject properly taxable, in which the taxpayers claimed that the tax had become invalid because the increase was excessive. It was a tax on oleomargarine, a substitute for butter. The tax on the white oleomargarine was one quarter of a cent a pound, and on the yellow oleomargarine was

first 2 cents and was then by the act in question increased to 10 cents per pound. This court held that the discretion of Congress in the exercise of its constitutional powers to levy excise taxes could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive. It was the same principle as that applied in the Veazie Bank Case. This was what Congress, in selecting its subjects for taxation, might impose the burden where and as it would, and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face, as does the law before us, the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."

As stated by Chief Justice Taft, in the McCray case, the law did not "show on its face, as does the law before us, (Bankhead Act) the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."

With regard to the Doremus case, Mr. Chief Justice Taft said:

"The fourth case is United States v. Doremus, 249 U. S. 86, 63 L. Ed. 493, 39 Sup. Ct. Rep. 214. That involved the validity of the Narcotic Drug Act (Dec. 17, 1914, 58 Stat. at L. 785, Chap. 1, Comp. Stat. Sec. 6287g, and 4 Fed. Stat. Anno. 2d Ed. p. 177), which imposed a special tax on the manufacture, importation, and sale or gift of opium or coca leaves or their compounds or derivatives. It required every person subject to the special tax to register with the collector of internal revenue his name and place of business, and forbade him to sell except upon the written order of the person to whom the sale was made, on a form prescribed by the Commissioner of Internal Revenue. The vendor was required to keep the order for two years, and the purchaser to keep a duplicate for the same time, and all were to be subject to official inspection. Similar requirements were made as to sales upon prescriptions of a physician, and as to the dispensing of such drugs directly to a patient by a physician. The validity of a special tax in the nature of an excise tax on the manufacture, importation, and sale of such drugs was, of course, unquestioned. The provisions for subjecting the sale and distribution of the drugs to official supervision and inspection were held to have a reasonable relation to the enforcement of the tax, and were therefore held valid.

> "The court said that the act could not be declared invalid just because another motive than taxation, not shown on the face of the act, might have contributed to its passage. The case does not militate against the conclusion we have reached in respect to the law now before us. The court, there, made manifest its view that the provisions of the so called taxing act must be naturally and reasonably adapted to the collection of the tax, and not solely to the achievement of some other purpose plainly within state power."

The Doremus case is likewise easily distinguished from this case.

(1) The subject matter of the Doremus case was narcotics, an admittedly contraband article which needs to be closely regulated.

Here the production of cotton is legitimate occupation, subject exclusively to state control.

(2) In the Doremus case the regulations had reasonable relationship to the enforcement of the tax.

Here the regulations plainly show they are to control production of cotton.

The next case we desire to call the Court's attention to as supporting the contentions here raised is that of Hill v. Wallace, 259 U. S. 44, 66 L. Ed. 822.

A careful reading of the entire opinion is most earnestly urged, as, in addition to being an authority in point on the merits, it sustains the following questions urged under the Motion to Dismiss:

(1) Right to maintain this action as a class suit. In the Hill case eight members of the Board of Trade were permitted to maintain the action as a class suit.

(2) That Sec. 3224 does not apply to a suit of this character.

(3) That injunction relief is proper, even as against a tax measure, where property rights are involved, and irreparable damage,

The case, on its merits, involved the validity of an act which sought to levy a tax of twenty cents a bushel on contracts for the sale of grain in the future, with certain exceptions, and "Providing for the Regulation of Boards of Trade". What were considered by the Court to be the essential features of the Act are briefly set out in the opinion.

The court quotes the title of the Act, and considers the language set out above of sufficient importance to put it in italics:

The Act further provided that contracts for future sale of grain made by or through a member of the Board of Trade designated by the Secretary of Agriculture as a contract market were to be exempt from the tax.

The Act further provided that the Secretary of Agriculture should designate the contract market when, and only when, such boards as were to be made contract markets agreed to do certain acts which are specified in the opinion itself.

Boards of trade desiring to be designated as contract markets were required to apply to the Secretary of Agriculture, and had to agree to abide by his rules and regulations.

Provision was made in the Act for the denial of the privilege of trading in futures to any person who violated the rules and regulations.

A penalty of 50 per cent of the tax and a fine of $10,000, or imprisonment for one year, or both, were provided by the Act.

After setting forth these matters the opinion reads:

> "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed, the title of the act recites that one of its purposes is the regulation of boards of trade. As the bill shows, the imposition of 20 cents a bushel on the various grains affected by the tax is most burdensome. The tax upon contracts for sales for future delivery under the [illegible] revenue act is only 2 cents upon $100 of value, whereas this tax varies, according to the price and character of the grain, from 15 per cent of its value to 50 per cent. The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all. Even if we conceded, as we do not, that the keeping of a memorandum and of the particulars of each sale as a record for three years or more, not only of contracts for future delivery, but also of cash sales, neither of which are subject to tax in designated boards of trade, would help taxing officers in any way to detect the evasion of this tax outside of such boards, no such con-

struction can be put upon the provisions which require the board of trade to prevent a dissemination of false or misleading reports, or to prevent the manipulation of prices or the cornering of grain, or which enforce the admission to membership in the board of the representatives of co-operative associations of producers, or the abrogation of rules against rebate as applied to such representatives. The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. The elaborate machinery for hearings by the Secretary of Agriculture and by this commission of violations of these regulations, with the withdrawal by the commission of the designation of the board as a contract market, and of complaints against persons who violate the act or such regulations, and the imposition upon them of the penalty of requiring all boards of trade to refuse to permit them the usual privileges, only confirm this view.

"Our decision, just announced, in Bailey v. Drexel Furniture Co., 259 U. S. 20, ante 817, 21 A. L. R. 1452, 42 Sup. Ct. Rep. 449, involving the constitutional validity of the Child Labor Tax Law, completely covers this case. We there distinguish between cases like Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482, and McCray v. United States, 195 U. S. 27, 49 L. Ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561, in which it was held that this court could not limit the discretion of Congress in the exercise of its constitutional powers to levy excise taxes because the court might deem the incidence of the tax oppressive or even destructive. It was pointed out that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed regulation of a concern or business wholly within the police power of the state, with a heavy exaction to promote the efficacy of such regulation. We there say:

'Out of proper respect for the acts of a coordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of

which the states have never parted with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject, and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress, and completely wipe out the sovereignty of the states.'

"This has complete application to the act before us, and requires us to hold that the provisions of the act we have been discussing cannot be sustained as an exercise of the taxing power of Congress conferred by Sec. 8, article 1."

Applying the above quoted portion of the opinion to the instant case, it will be observed that the Title of the Bankhead Act recites that it is an act to place the cotton industry on a sound commercial basis, prevent unfair competition, etc.

Where in the Grain Futures case the Secretary of Agriculture was authorized to designate certain Boards of Trade as contract merkets, and to exempt sales made by them from the tax, so here in the Bankhead Act the Secretary of Agriculture designates the amount of cotton that may be raised tax free, and apportions it among the states, counties, and individual farms.

Where in the Grain Futures case Boards of Trade were required to apply to the Secretary of Agriculture for designation as contract markets, and, as a prerequisite, had to agree to abide by certain rules and regulations, so here in this Act the individual farmers are required to apply for exemption certificates, and agree to abide by the Secretary of Agriculture's rules and regulations.

Where in the Grain Futures Act under certain conditions the Secretary could deny trading privileges to a person who violated the Act, so here a farmer may be denied exemption certificates, and without them he cannot have bale tags placed on his cotton, cannot move his cotton out of the county, etc. A ginner who fails to give the bond, apply for the bale tags, etc., cannot pursue his occupation as a ginner

Where in the Grain Futures act various duties were required to be performed, records kept, etc., which had no proper relationship to the collection of the tax, so here the most minute records are kept of every pound of cotton ginned, all of it is required to be tagged, etc., although it is known in advance that only an infinitesimal part will be subject to the tax, and it is hoped and intended that none of it will be taxed.

The analogy could be extended farther, but the foregoing is sufficient to show here that it is impossible to escape the conviction, from a full reading of the Bankhead Act, that it was enacted for the purpose of regulating the production of cotton through the supervision of the Secretary of Agriculture.

The manifest purpose of the Bankhead bill is to compel the farmers and ginners, by complying with its regulations, to reduce the cotton to be produced to the allotment made.

The Bankhead Act is in essence and on its face a complete regulation of the production of cotton, with a "penalty" of 50 per centum of the contract price per pound of lint cotton on all cotton produced over the allotted amount. Its purpose being so plain, it leaves no grounds upon which it can be sustained as a valid exercise of the taxing power of Congress.

The Court in Hill v. Wallace, then goes on to consider the question as to whether, or not, the Act can be sustained under the commerce clause, and reaches the conclusion that it cannot. It is deemed unnecessary to pursue that question here, as that feature has already been fully covered.

Another case in point is Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 1061. This case involved the National Prohibition Act, and the plaintiff sought to enjoin the collection of an assessment levied against him upon the ground that it was a penalty, and not a tax.

Mr. Justice McReynolds said:

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that, within the true intendment of the term, a tax was laid, Child Labor Tax Case (May 15, 1922) (259 U. S. 21, ante, 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449). When by its very nature the imposition is a penalty, it must be so regarded. Helwig v. United States, 188 U. S. 605, 613, 47 L. Ed. 614, 23 Sup. Ct. Rep. 427. Evidence of crime (Sec. 29) is essential to assessment under Sec. 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government', and clearly involves the idea of a punishment for infraction of the law, - the definite function of a penalty. O'Sullivan v. Felix, 233 U. S. 318, 324, 58 L. Ed. 980, 982, 34 Sup. Ct. Rep. 596.
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> "The collector demanded payment of a penalty, and Sec. 3224, which prohibits suits to restrain assessment or collection of any tax, is without applica-

tion. And the same is true as to statutes granting the right to sue for taxes paid under protest. A revenue officer, without notice, has undertaken to assess a penalty for an alleged crimal act, and threatens to enforce payment by seizure and sale of property without opportunity for a hearing of any kind."

The case of Lipke v. Lederer, supra, is cited and reaffirmed in Regal Drug Corporation v. Wardell, 260 U. S. 386, 67 L. Ed. 318.

The case of Hill v. Wallace, supra, is cited and reaffirmed in Trusler v. Crooks, 269 U. S. 475, 70 L. Ed. 365.

The case of Linder v. United States, 268 U. S. 5, 69 L. Ed. 819, arose under the same law as did the Doremus case, upon which the Government relies to sustain the Bankhead Act. It is, therefore, desired to quote the following from the Linder opinion:

"The declared object of the Narcotic Law is to provide revenue, and this court has held that whatever additional moral end it may have in view must 'be reached only through a revenue measure and within the limits of a revenue measure'. United States v. Jin Fuey Moy, 241 U. S. 394, 402, 60 L. Ed. 1061, 1064, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917D, 854. Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced."

"Obviously, direct control of medical practice in the states is beyond the power of the Federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure."

Again the opinion says:

"The Narcotic Law is essentially a revenue measure, and its provisions must be reasonably applied with the primary view of enforcing the special tax. We find no facts alleged in the indictment sufficient to show that petitioner had done anything falling within definite inhibitions or sufficient materially to imperil orderly collection of revenue from sales. Federal power is delegated, and its prescribed limits must not

be transcended even though the end seems desirable. The unfortunate condition of the recipient certainly created no reasonable probability that she would sell or otherwise dispose of the few tablets intrusted to her; and we cannot say that by so dispensing them the doctor necessarily transcended the limits of that professional conduct with which Congress never intended to interfere.

"The judgment below must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion."

Two late cases by Judge Dawson, of the United States District Court for the Western District of Kentucky, will conclude the authorities on this point.

In Hart Coal Corporation v. Sparks, 9 F. Supp. 825, Judge Sparks holds that unconstitutional interference by the Government with the right to conduct the coal business constitutes injury to a "property right", and warranted equitable relief.

He permitted the suit to be maintained as a class suit, and the District Attorney to be enjoined.

A careful study of the entire opinion is respectfully urged.

The case of Penn v. Glenn, 107 F. Supp. _____, involved the construction of the Kerr-Smith tobacco control act.

The Kerr-Smith Act was adopted at the same session of Congress as was the Bankhead Act, and is to be found in the pocket supplement to Title 7, Agriculture of U. S. C. A. immediately following the Bankhead Act. Chapter 27 covers the Bankhead Act, and chapter 28 covers the Kerr-Smith Act.

In a well reasoned opinion Judge Dawson analyzes the Kerr-Smith Act, and holds it unconstitutional, as an unwarranted interference by Congress with the production of tobacco, a purely intrastate matter. It is assumed the Court will give thoughtful consideration to the opinion in that case.

Before leaving the Penn case, it might be well to point out that Judge Dawson's action in denying the injunction there is easily distinguishable from the present case. In the Penn case the plaintiffs were tobacco producers, and were merely seeking by injunction to escape the payment of the tax assessed by the terms of the Act. Judge Dawson held that the bill did not show such extraordinary circumstances as to take it out from under Bailey v. George. In other words, there was apparently an adequate remedy at law in that plaintiffs could pay the tax, and then sue for its recovery.

In the instant case, plaintiffs are not producers of tobacco, and are not required to pay any tax under the Bankhead Act. They are made revenue officers, by the regulations, and at heavy and unreasonable expense are required to collect the tax from the farmers and pay it over to the Collector. No provision to reimburse them is made in the Act, and every dollar they thus pay out is gone forever, and hence constitutes irreparable damage. What these plaintiffs are seeking to have protected herein is their constitutional right to carry on their respective lawful occupations as cotton ginners free from unconstitutional governmental interference, and to prevent the confiscation of their respective gin plants because they refuse to comply with an invalid law.

Before leaving the question of whether the Bankhead Act can be upheld as a valid excise tax, we will refer briefly to the other two cases cited under that section in the brief found in 78 Congressional Record, Part 4, Pages 3966-67.

Billings v. United States, 232 U. S. 261, 59 L. Ed. 596. This case involved the levy of an excise tax upon foreign built pleasure yachts used by citizens of the United States. The only constitutional question discussed in the opinion was as to whether, or not, the tax lacked uniformity because it was not also levied on pleasure yachts not foreign built. None of the questions here involved are even mentioned, much less discussed. It cannot be conceived, that this case affords any support for the contention that the Bankhead Act is valid.

Brushaber v. Union Pacific Railroad Co., 240 U. S. 1, 60 L. Ed. 493. This case involved an attack upon the corporate income tax law, an admittedly legitimate revenue measure. The Court will take judicial knowledge of the fact that the various income tax measures passed by Congress have been enacted for the express and sole purpose of raising revenue. While they are burdensome, they do not attempt to supervise and regulate private business. Neither do they attempt to say how the persons affected shall earn their incomes, nor how much or how little such incomes shall be. Certainly the Brushaber case affords no analogy to the present case.

It is confessed that this portion of the brief has proceeded to greater length than was anticipated, and is, perhaps, too lengthy. Because of the importance of the question, the effort has been made to review the Act itself, the Congressional hearings, and the decisions in detail in order to thoroughly demonstrate that this Act cannot be upheld as a valid exercise of the taxing powers of Congress. It is earnestly asserted that the Act must be condemned as clearly and affirmatively showing, by its own terms, that it is an attempt to regulate and control the production of cotton,

a purely intrastate matter, and the so called ginning tax is merely a penalty to aid in effectively enforcing the real purpose of the bill, namely the control of the production of cotton.

Is the Bankhead Act Unconstitutional Because It Delegates Legislative Authority?

The rule announced in determining the answer to the above question, has been laid down and followed in numerous decisions. One of the shortest and best statements of it is to be found in Hampton v. United States, 276 U. S. 407, 72 L. Ed. 329, where the Court said:

> "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involved a discretion as to what it shall be, and conferring in authority, or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made."

In Miller v. Mayor, 109 U. S. 394, 27 L. Ed. 974, the Court said:

> "The efficiency of an Act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the Act shall take effect may be left to such agencies as it may designate."

Other cases on the subject are Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 35 S. Ct. 387; U. S. v. Grimaud, 220 U. S. 506, 31 S. Ct. 480; Panama Refining Co. v. Ryan, 79 L. Ed. 1; Schlecter v. United States, 79 L. Ed. 888.

An excellent statement of the test to be applied here is found in 12 A. L. R. 1436, as follows:

> "The generally accepted rule is to the effect that a statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business, profession, appliance, etc., in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals, etc., according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform, is unconstitutional and void."

The Court is here primarily concerned with the operation of the Bankhead Act for the crop year 1935-1936, for that is the period now under consideration.

In the analysis of the Act to determine the present question, it is to be kept constantly in mind that this is claimed to be a valid revenue measure, and is supposed to have for its primary purpose the levying of a uniform tax on the "ginning of cotton" which will apply with like force and effect to every farmer in the Cotton Belt.

Does Congress, by the terms of the Bankhead Act, vest "arbitrary discretion with respect to an ordinarily lawful business in public officials, without specifying a uniform rule of action"?

Does Congress, by the terms of the Bankhead Act, levy an excise tax which is to be enforced by public officials who are controlled and guided by definite rules and specified conditions to which all similarly situated are permitted to conform?

It is here asserted that the vices in the Bankhead Act, as applied to the crop year for 1935-1936, begin with the method by which the law may be declared in force for that period.

Sec. 1 of the Act provides that in order to relieve the present "economic emergency", by (a) reducing the disparity between prices paid to (1) cotton producers and (2) persons engaged in marketing cotton and prices of other commodities and (b) by restoring the purchasing power of such persons so that normal exchange of all commodities may be fostered, and (c) to raise revenue to enable the payment of additional benefits under Chapter 26 (A. A. A.)

It is hereby declared to be the policy of Congress

(1) To promote the orderly marketing of cotton in interstate and foreign commerce;

(2) To enable producers of such commodity to stabilize their markets against undue and excessive fluctuations;

(3) To preserve advantageous markets for such commodity;

(4) To prevent unfair competition and practices in putting cotton into channels of interstate and foreign commerce;

(5) To more effectively balance production and consumption of cotton.

Let us analyze the foregoing for definiteness and clarity in pronouncing the guide by which the administrative officers are to act for 1935-1936.

While the term "present economic emergency" is used, no effort is made to define it, or to even intimate the facts and circumstances which Congress conceives create the economic emergency. It is not attempted to be stated that there is an abnormal carry over of cotton, or what number of bales is found to constitute such abnormal carry over. No other definite fact or circumstance is stated.

It is not stated that such undefined "economic emergency" is to be relieved by reducing the disparity between prices paid for cotton and prices paid for "other commodities." No attempt is made to define the disparity, to state what is conceived to be a normal price for cotton, to state what other commodities are thus referred to, or to give any other definite fact or circumstance.

It is next stated that such unknown and uncertain "economic emergency" is to be relieved by restoring the purchasing power of such persons (cotton producers and marketers) so that "normal exchange" of all commodities may be fostered. It is not stated what constitutes "normal exchange", to what level the restoration of purchasing power is to be restored, or how same is to be restored.

To accomplish the foregoing indefinite and uncertain aims, and rectify this undefined state of affairs, it is declared to be the policy of Congress

(1) To promote the orderly marketing of cotton in interstate and foreign commerce.

No attempt is made to state what is meant by "orderly marketing", or how such aim is to be accomplished. Certainly a tax could not be used to restore the orderly marketing of cotton in foreign commerce, because such action is prohibited by U. S. Constitution, Art. 1, Sec. 9 (5).

(2) To enable producers of such commodity to stabilize their markets against undue and excessive fluctuations.

What "undue and excessive fluctuations" are thus referred to is left to the imagination, as are the means by which the stabilization is to be effected.

(3) To preserve advantageous market for such commodity.

What markets are thus referred to? What is meant by "advantageous"? How are such markets to be preserved?

(4) To prevent unfair competition and practices in putting cotton into channels of interstate and foreign commerce.

What constitutes "unfair competition and practices", and who is guilty of same? How is it to be prevented?

(5) To more effectively balance production and consumption of cotton.

No effort is made to define the balance sought to be attained, or to announce any definite rule as to when this balance has been reached.

A significant fact is that no one of the five policies of Congress, above enumerated, makes any reference to the raising of revenue.

Coming to the crop year 1935-1936, Sec. 2 provides that if the President finds

(1) That the "economic emergency" in cotton production and marketing will continue or is likely to continue,

(2) That because of such economic emergency the application of this Act is imperative for 1935-1936 in order to carry out the policy defined in Sec. 1, he is to proclaim the Act to be in force for 1935-1936.

Since the Act makes no effort to define the "economic emergency", or to state the facts and circumstances constituting same, it seems self evident that Sec. 2 leaves it absolutely to the discretion of the President as to whether the Act shall be in force for 1935-1936, and the Act itself furnishes no definite guide or standard by which the President is to be governed in the exercise of that discretion.

Further, the "policy" of Congress having been couched in such vague and uncertain language, the President is again left without definite guide or standard to determine the imperativeness for the continued operation of the Act.

Not only is the further continuance of the Act left to the discretion of the President, without definite guide or standard, but

Sec. 3(a) provides that after the President's proclamation, the Secretary of Agriculture must

(1) Find that two thirds of the producers favor the levy of a tax on cotton produced in excess of the allotment made to meet the probable market requirements.

(2) Determine that such tax is required to carry out the policy declared in Sec. 1.

No definite rule is provided by which the Secretary of Agriculture is to be guided in finding out the desire of two thirds of the producers. This Court is entitled to take judicial knowledge of the impracticability of correctly and accurately obtaining expressions from two thirds of so numerous a class as the cotton producers of the United States. This Court is further entitled to take judicial knowledge of the method by which the Secretary of Agriculture actually undertook to ascertain the wishes of the cotton producers. It is known that his Department placed a limited number of questionnaires in the hands of various county agents over the Cotton Belt, and these county agents submitted them to farmers of their own choosing. It is not seriously contended that a representative canvass was made.

But, conceding for the purpose of argument, that a representative vote was taken, and expressions obtained from two thirds of the cotton producers, the Act, by its own terms, makes its enforcement for 1935-1936 dependent upon the vote of two thirds of the cotton producers. Then we have a purported revenue law of the United States clothed with vitality for another year not upon the expressed will of Congress, the legislative body, but upon a "straw vote" of two thirds of the class to be taxed. Legislative history since the Birth of the Union furnishes no parallel for this remarkable procedure.

Another remarkable procedure is that the vote is supposed to be based upon the expression of the desire of the producers to have the tax levied on the ginning of cotton "in excess of an allotment made to meet the probable market requirements", but the vote is taken before the allotment is made. The farmers vote, and then create the Secretary of Agriculture their proxy to arbitrarily determine what this allotment is to be.

After the President has exercised his discretion in the matter, without definite guide or standard, and after this "straw vote" of two thirds of the producers is taken, still a third step is necessary.

The Secretary of Agriculture must determine that such tax is necessary to carry out the uncertain and indefinite policy of Congress as expressed in Sec. 1. No rule or rate is prescribed by which the Secretary is to be governed in coming to this determination, but it is left entirely to his unbridled discretion.

Summing up, for 1935-1936 a purported revenue act of Congress is based, not upon the expressed will of the law

making body, but upon (1) the ascertainment of the existence of an unknown and undefined "economic emergency" arrived at by the Chief Executive, without guide or standard, (2) the further determination by him that it is imperative to carry out a vague and uncertain policy, this second determination also arrived at without definite guide or standard, (3) the uncertain popular vote of two thirds of the affected class, and (4) the determination by still another executive officer, the Secretary of Agriculture, that such tax is needed to carry out a vague and uncertain policy of Congress, this last determination likewise having been arrived at without definite guide or standard.

But the difficulties do not end there.

Sec. '3 (a) further prescribed that the Secretary of Agriculture "shall ascertain from an investigation (1) of the available supply of cotton and (2) the probable market requirements, the quantity of cotton that should be allotted in accordance with the policy declared in Sec. 1, for marketing in the channels of interstate and foreign commerce, from production of cotton during the succeeding cotton crop year, exempt from the payment of taxes thereon."

In this connection it is well to note Sec. 4(d) which reads:

> "When the Secretary of Agriculture does not proclaim an allotment of cotton for a crop year as provided in Section 3 of this Act, the tax shall not apply with respect to cotton harvested during such crop year but shall apply to cotton harvested during the next crop year for which, with the approval of the President, the Secretary makes an allotment under such section."

Practically applying the above sections of the Act, the Secretary of Agriculture, without definite guide of standard, is authorized to make and proclaim the amount of cotton which may be ginned tax free for the crop year 1935-1936. The Secretary of Agriculture, an administrative officer who normally has no duties in connection with the revenue laws, is made the supreme arbiter of whether the Bankhead Act shall function as a revenue measure for 1935-1936. He may, in his discretion, allot 5,000 bales or 50,000,000 bales as being needed to meet the "probable market requirements". He may even decline to make any allotment, in which event the tax will not be operative for 1935-1936. Counsel for the Government are hereby challenged to cite another instance, prior to the present Administration, where such powers with regard to a revenue law were ever vested in the Treasury Department itself, much less in some Department not charged with the duty of enforcing the revenue laws.

Another fatal defect in the Act, viewed from a revenue standpoint, in the uncertainty with regard to who is to pay the tax.

Sec. 4(a) provides:

"There is hereby levied and assessed on the ginning of cotton", etc.

Sec. 4(c) provides:

"Every person ginning any cotton subject to tax under this Act (whether as agent of the owner or otherwise) and every other person liable for tax under this Act shall make monthly returns under oath in duplicate and pay the taxes imposed by this Act to the collector for the district in which the ginning is done, or to such other person as such collector may direct. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid."

Sec. 4(f) provides that the tax shall not be collected upon the ginning of cotton which is to be stored, but a lien card shall be placed on same, and the tax paid when the cotton is marketed.

Certainly one of the necessary elements of a valid revenue act must be that the legislative body shall definitely state who is to pay the tax. By regulation the Commissioner of Internal Revenue has attempted to place responsibility for the tax on the ginner, and counsel for the Government in this case argued that the ginner owed the tax. This Court knows that ninety nine per cent of the cotton ginned in the United States is not owned or controlled by the ginner. It is academic that even Congress is without power to require a man to pay a tax on that which he does not own.

Another vice in the Act is the uncertainty as to the amount of the tax. It is true that the Act provides that the tax is to be "50 per centum of the average central market price per pound of lint cotton". But Sec. 4(b) provides:

"The average central market price, per pound of lint cotton, shall be the average price per pound of basis seven-eighths-inch middling spot cotton on the ten spot cotton markets (designated by the Secretary of Ag-

> riculture) as detemmined and proclaimed from time to time by the Secretary of Agriculture. The average central market price determined and proclaimed shall be the base for determining the rate of the tax until a different averaged central market price for lint cotton is determined and proclaimed by the Secretary of Agriculture."

It will be observed that it is left absolutely to the discretion of the Secretary as to what ten spot cotton markets are designated, and where they are to be located. It is further discretionary with him to change any previous designation of spot cotton markets, and he is thus able to control at will the basis upon which the tax is to be figured.

The arbitrary and absolute domination of this Act by the Secretary of Agriculture is further exhibited in Sec. 6 which provides:

> "No certificate of exemption shall be issued and no allotment shall be made to any producer unless he agrees to comply with such conditions and limitations on the production of agricultural commodities by him as the Secretary of Agriculture may, from time to time, prescribe to assure the cooperation of such producer in the reduction programs of the Agricultural Adjustment Administration and to prevent expansion on lands leased by the Government of competitive production by such producers of agricultural commodities other than cotton and the allotment of and certificates of exemption issued to any producer shall be subject to revocation on violation by him of such conditions and limitations, and no criminal penalties shall apply to the violation of this provision."

Thus it is clear that Congress does not pass a revenue measure which is complete within itself, and operates upon all members of the class uniformly. On the contrary, the basic right of an individual farmer to exemption certificates to which he would otherwise be entitled, is left to the whims and caprice of the Secretary of Agriculture in the administration of a totally different law. A farmer, to be entitled to exemption certificates under this Act, must agree that he will abide by "such conditions and limitations" on the production of all other agricultural commodities as the Secretary of Agriculture may "from time to time" prescribe. In other words, a farmer surrenders his farm, and his self respect, into the arbitrary keeping of the Secretary of Agriculture. Congress does not announce in plain and unmistakable terms when, how, in what manner, and to what extent, the farmer is taxed by this Act, but it is all left to the Secretary of Agriculture.

While some effort is made for the year 1934-1935 to prescribe the basis upon which the Secretary of Agriculture

shall apportion the 10,000,000 bale allotment between the several States, and between the Individual counties within the State, a careful reading of Sec. 7(a) will show that the allotment to be made to the individual farmer within the county is left absolutely to the whims and caprice of the representatives of the Secretary of Agriculture. Farmer Jones can be allotted 100 bales, and Farmer Smith, who has the adjoining farm, can be allotted 10 bales, and there is nothing Farmer Smith can do about it. It is all to be "upon such basis as the Secretary of Agriculture deems fair and just"; and no standard is set up to control him, and no method of appeal from his decision is provided.

Furthermore, Sec. 7(b) reads:

> "After the crop year 1934-1935 the apportionment shall not be on the basis set out in paragraph (1) of subsection (a) of this section."

Paragraph (1) of subsection (a) was the only one of the three methods provided for individual allotments which even approximated fairness and uniformity, and it is expressly provided that it shll not apply after 1934-1935.

Sec. 9(a) provided that an individual farmer shall be entitled to exemption certificates,

> "only upon proof satisfactory to the Secretary of Agriculture that the producer is entitled thereto pursuant to this Act and the regulations thereunder."

No effort is made to say of what such proof shall consist, and no appeal is provided. Thus Farmer Jones, by the order of the Secretary of Agriculture, may escape the tax because his proof is deemed satisfactory, but Farmer Smith pays tax on every pound of cotton he raises because the Secretary of Agriculture does not deem his proof to be satisfactory,

Further Sec. 9(d) provides

> "any and all certificates of exemption may be transferred or assigned in whole or in part in such manner as the Secretary of Agriculture may prescribe."

It will thus be seen that the Bankhead Act is not a revenue measure which says every cotton producer shall be given a quota of cotton to be determined by some well defined standard, and upon any and all cotton he produces over that quota he shall pay a definite and defined tax.

On the contrary, the Act leaves the original apportionment of the quota to the caprice of an executive officer, and then further says that he may, by such rules and regulations as he sees fit to adopt, permit the holders

of exemption certificates to barter them around between themselves, so that Farmer Jones can raise his allotted 100 bales, and, by purchasing certificates, can raise as much more tax exempt cotton as he cares to. The only fixed limitation is that the total cotton ginned tax free in the United States must not exceed the total amount allotted.

As a final proposition, the Court's attention is again directed to the broad, but vague and uncertain, purposes of the Act as attempted to be set forth in Sec. 1. Among others is the one "to prevent unfair competition and practices in putting cotton into channels of interstate and foreign commerce."

Sec. 12 reads:

> "Sec. 12. The Commissioner, with the approval of the Secretary of the Treasury, shall prescribe (a) regulations with respect to the time and manner of applying for, issuing, affixing, and destroying bale tags, and the method of accounting for receipts from the sale of and for the use of such bale tags, and (b) such other regulations as he shall deem necessary for the enforcement of the taxing provisions of this Act."

Sec. 15(a) reads:

> "Sec. 15 (a) The Secretary of Agriculture is authorized to make such regulations as may be necessary to carry out the powers vested in him by the provisions of this Act."

It is submitted that either of these officials can make such rules and regulations as he may see fit to prevent "unfair competition", without any attempt being made in the Act itself to define that term, and a cotton producer who violated such regulation would be subjected to all the panel provisions of the Act.

Your plaintiffs most earnestly urge that the broad and unlimited powers given to the Secretary of Agriculture under this Act, without any definite guide or standard, bring this case squarely within the rule discussed and elaborated upon in Panama Refining Co, v. Ryan, supra, and Schecter Poultry Corporation v. United States, supra, and said Bankhead Act should be declared unconstitutional on this additional ground.

Are Certain Regulations Void as Being Without Support in the Act Itself?

Your petitioners here respectfully aver, that even if the Act be constitutional, which is not admitted but most strenuously denied, the regulations hereinafter discussed

should be declared void, as having no support in the Act itself, and as being unwarranted attempt to legislate by the Commissioner of Internal Revenue.

The authorities relied upon are as follows:

Hamilton v. Dillon, 88 U. S. 74, 22 L. Ed. 530. A tax of four cents a pound was laid on cotton shipped out of states that had been in insurrection during the Civil War. Hamilton, the plaintiff, was engaged in the trade of buying cotton and shipping same from Nashville. He obtained permission to purchase and export cotton, paying the four cents per pound tax, afterwards bringing suit to recover such tax. The court held that under the law itself regulations were authorized empowering the tax collected; that the plaintiff voluntarily applied for permission to export cotton and voluntarily paid the tax. The Court held that he therefore was in no position to bring suit to recover a tax after applying for permission and obtaining permission to ship the cotton upon payment of the tax.

The Court further held that the permission to ship the cotton and the sum received therefor, were had under the war power of the government and not under its taxing power. "Due regards to regulations in question is nothing more than exercise of this power (war power). It does not belong to the same category as the power to levy and collect taxes, duties and excises."

Merritt v. Welsh, 104 U. S. 700; 26 L. Ed. 899. Where an attempt is made to collect a tariff on sugar of a different quality than that set forth in the Act levying the tariff, the Court held that a regulation made by the Secretary of the Treasury not in accord with the Act itself was invalid and that the regulations must be such as to come within the meaning of the Act of Congress.

> "This reasoning would be very good if the law prescribing the standard were not explicit in its terms. Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first, from the words they have used. If these are clear, we need not go further; if they are obscure or ambiguous, then the intent may have to be sought out by reference to the context, to previous or concurring enactments, to the history of the art of trade, to general history, to anything that will throw light on the meaning of the obscure or ambiguous terms used. But there is no obscurity or ambiguity here. Two tests for fixing the dutiable grades of sugars, were open to the legislative choice; that of color and that of constitution or chemical quality. Congress chose the former. It is not strange that it did so; the color

> test had long been used and was well calculated to designate quality in the old sugars, manufactured in the old way. But in making its election Congress did not leave any room for doubt as to its meaning. It used apt terms to express it; terms free from all ambiguity and obscurity. If the test adopted fails to effect the desired object, the inconvenience or loss to the Treasury need only be temporary; it can be changed any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain works and seeks to spell out or guess at the supposed intent of the Legislature, contrary or supplementary to that which is clearly embodied in the words it has used." ********** If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department of the courts, to take the part of legislative guardians, and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. ******** A better remedy than that of making a forced construction of the law is in the power of Congress. All that has to be done is, to change the law so as to reach the goods in their new form, if it is thought desirable to do so. If the law is found defective let it be altered so as to attain the result desired."

Morrill v. Jones, 106 U. S. 524, 27 L. Ed. 268.
Where by Act of Congress animals imported for breeding purposes were free of duty, the Secretary of the Treasury, by regulation held that such animal to be admitted free must be of superior stock admitted to improve the breed in the United States. The Court said:

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. ***** In our opinion the object of the Secretary of the Treasury could only be accomplished by an amendment of the law. That is not the office of a Treasury regulation."

U. S. v. Eaton, 144 U. S. 688, 36 L. Ed. 594.
Under the laws passed by Congress manufacturers were required to keep certain books and make reports in reference to oleomargarine made and sold by them, the reports being sent to the Commissioner of Internal Revenue. The law further authorized the Secretary of the Treasury to make such rules and regulations as might be needed to carry out the intent of the said law. Acting thereunder for the purpose

of enforcing the law, wholesale dealers in oleomargarine were required to keep records showing all oleomargarine received and disposed of by them, the party to whom sold, and to make monthly reports giving out information required by the regulations prescribed through the Commissioner of Internal Revenue. A wholesaler was indicted, failing to keep such books and records, and upon conviction his conviction was set aside by the Supreme Court, which held that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, but all he can do is to prescribe the mode for carrying into effect the law that Congress has enacted.

> "It is necessary that a sufficient statutory authority should exist for declaring any Act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Section 41 of the Act of October 1, 1890."

Williamson v. U. S., 207 U. S. 463, 52 L. Ed. 282. Williamson was indicted and convicted in the lower court because of his failure to comply with the rules and regulations enacted by the General Land Office in reference to interest under the Stone and Timber Act. On appeal it appeared that the regulations prescribed by the Commissioner of the General Land Office were not authorized under the terms of the Act itself. The Court held that under the authority to make regulations for the effective execution of the law, the executive officer cannot by such regulations add to or limit the provisions of the law. The Court admitted the authority to make regulations in compliance with the Act of Congress, but held:

> "But this power must, in the nature of things, be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

In upholding a regulation prescribing reports to be made and method of grazing stock on public lands, the Court found that the regulations made complied with and were within the provisions of the Act of Congress under which made.

But in referring to the cases hereinbefore cited the opinion states as follows:

"The Secretary of Agriculture could not make rules and regulations for any and every purpose. Williamson v. U. S., 207 U. S. 462, 52 L. Ed. 297, 28 Sup. Ct. Rep. 163. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined."

U. S. v. Grimaud, 220 U. S. 522, 55 L. Ed. 570.

Taking up the sections of the Act itself and the regulations prescribed thereunder, we find the following:

Par. 4 of the Bill

Secs. 6 and 6(a)

Sec. 4(a) of the Act itself reads:

"Sec. 4(a). There is hereby levied and assessed on the ginning of cotton hereafter harvested during a crop year with respect to which this Act is in effect, a tax at the rate per pound of the lint cotton produced from ginning, of 50 per centum of the average central market price per pound of lint cotton, but in no event less than 5 cents per pound. If the cotton was harvested during a crop year with respect to which the tax is in effect, the tax shall apply even if the ginning occurs after the expiration of such crop year."

Article 8 of the Regulations reads:

"Art. 8. Liability for the tax. Except where payment of the tax is postponed, as provided for in Article 13, liability for the tax attaches to the ginner immediately upon the ginning of cotton. Where payment of the tax is postponed, as provided for in article 13, liability for the tax does not attach to the ginner, (See article 21)."

It will thus be seen that the Act itself does not place the tax upon the ginner, nor does it attempt to make the ginner responsible for the collection of the tax. On the contrary, the Act, as a whole, places the tax on the producer. Hence the regulation is an attempt by the Commissioner of Internal Revenue to legislate on the subject matter in question, which may not legally be done.

Sec. 7.

Sec. 4(f) of the Act reads:

"Sec. 4 (f). The tax shall not be collected upon the ginning of cotton which is to be stored by the producer thereof either on the farm or at such other place as may be permitted by regulations prescribed by the Secretary of Agriculture and the Secretary of the Treasury. In such cases, the payment of the tax shall be postponed, but shall be paid at the time when bale tags are secured for such cotton. Bale tags may be secured for any of such cotton at any time after ginning (1) upon the payment to such person as the Commissioner may direct, of the amount of tax which would have been payable at the time of ginning, or (2) upon the surrender of certificates of exemption covering an amount of cotton not less than the amount of such cotton. Until bale tags are secured for such cotton, such cotton shall be subject to a lien in favor of the United States for the amount of the tax payable with respect to the ginning of such cotton. The right to postponement of the payment of the tax under this subsection shall be established in accordance with such regulations as the Secretary of Agriculture and the Secretary of the Treasury may prescribe. The Commissioner, with the approval of the Secretary of the Treasury, shall prescribe regulations providing for stamping the containers of such cotton so as to indicate the time of ginning and the amount of tax payable with respect thereto."

Article 13 of the Regulations reads:

"Art. 13. Postponement of time of payment. Where a producer intends to store lint cotton resulting from the ginning of cotton produced by him, either on his farm or at such other place as may be permitted by regulations prescribed by the Secretary of the Treasury and the Secretary of Agriculture, the tax shall not be collected upon the ginning of such cotton, but payment may be postponed until the time fixed for the producer to file his return covering such cotton. (See article 21). Until the return is filed and the tax is paid or exemption certificates covering the cotton are surrendered, the cotton in such bales shall be subject to a lien in favor of the United States for the amount of tax payable with respect to the ginning of such cotton. This lien shall be prior to all other liens, claims, or demands of any nature whatsoever.

"The ginner who gins such cotton shall obtain from the producer an affidavit, executed in triplicate, on the prescribed form, showing (1) the ginner's name, (2) the name and address of the producer, (3) the place where the cotton was produced, (4) the date on which the cotton was ginned, (5) the place where the lint cotton is to be stored, (6) the number of bales of lint cotton and the weight of lint cotton contained in each bale, and (7) the

serial number of the lien card attached to each bale. One copy of this affidavit shall be attached to the return filed for the month within which the ginning was done, one copy shall be retained by the ginner, and the third copy shall be retained by the producer.

"The ginner shall attach to each such bale of lint cotton a lien card, bearing a serial number, which shall be filled out in accordance with the instructions contained thereon. This card shall show the time of ginning, the weight of lint cotton contained in the bale, and the amount of tax due. The lien card will contain a statement to the effect (1) that the cotton is subject to a lien in favor of the United States for the amount of tax payable with respect to the ginning of such cotton, and (2) that any person who transports (except to the place of storage), sells, purchases, or opens this bale of cotton before a bale tag issued under the Act is attached thereto is liable to a fine not exceeding $1,000, or to imprisonment for not exceeding six months, or both. Such lien card shall not be removed from the bale until a bale tag has been procured and attached thereto. Lien cards may be obtained from any collector. For provisions relating to filing of returns by producers and payment of tax, see article 21."

It will thus be seen that the Act itself merely prescribes that if the producer desires to store certain of his cotton, the payment of the tax is to be postponed. It makes no attempt to place the burden upon the ginner to apply for the lien cards, obtain the affidavits in triplicate, or perform any of the other onerous duties in connection therewith.

Regulation 13 shifts the burden to the ginner, without compensation, to obtain the estimated quantity of lien cards he will need, be responsible for same while in his possession, return the unused lien cards, account for those used, and pay for any he cannot account for, obtain in triplicate the affidavits from the producers, keep one copy, forward one copy to Collector of Internal Revenue, and deliver one to the producer; keep all records called for in order to perform these duties.

The net result of regulation 13 is an attempt upon the part of the Commissioner of Internal Revenue to legislate in regard to the matter, and to make the ginner a deputy collector without compensation.

Sec. 8.

Article 20 of the Regulations reads as follows:

"Art. 20. Manner of obtaining bale tags and certificates of tagging by ginners - Bonds. (a)

Application. Every ginner who desires to obtain bale tags and certificates of tagging shall furnish bond and file, together with such bond, an application with the collector for the district within which the gin is located. The bond will be a continuing one, but a separate application for bale tags and certificates of tagging shall be filed for each calendar month at least 15 days prior to the 1st day of the calendar month within which the bale tags are to be used, except that applications for bale tags to be used prior to August 1, 1934, may be filed at any time prior to July 15, 1934. The application shall be under oath and must show (1) the amount of cotton the applicant believes will be ginned during that month, (2) the amount of cotton ginned by him during the same month in 1933, (3) what facilities he has to insure the safe storage of the bale tags and certificates of tagging, (4) that the bale tags and certificates of tagging will be properly protected and accounted for, and (5) that an accurate daily record will be kept which will show the serial number of each bale tag used.

(b) Bond. The bond referred to above in (a) shall be executed by the ginner and by two individual sureties or one corporate surety. In the case of individual sureties, each surety shall execute, on the prescribed form, an affidavit showing the value of the property, real or personal, owned by him, in excess of all liens, encumbrances, and exemptions. A separate bond shall be filed for each plant where ginning is done. The bond shall be in duplicate, with surety satisfactory to the collector. The penal sum of the bond shall be not less than $500 or more than $10,000 and shall be fixed in accordance with the following scale:

Number of bales (average 500 pounds each) ginned per month:	Penalty of Bond
Not more than 100 bales	$ 500
More than 100 bales but not more than 500 bales	1,000
More than 500 bales but not more than 1,000 bales	2,500
More than 1,000 bales but not more than 2,000 bales	5,000
More than 2,00 bales but not more than 3,000 bales	7,500
3,000 or over	10,000

"Forms of application, affidavit of surety, and bond may be obtained from any collector. Any such application, affidavit, or bond must be filled out completely and accurately in accordance with the instructions contained thereon, and in accordance with

these regulations. In lieu of surety or sureties, the ginner may deposit with the collector United States Liberty Bonds or other bonds or notes of the United States having a par value not less than the amount of the bond required to be furnished, together with an agreement authorizing the collector to collect and sell such bonds or notes so deposited in case of any default in the performance of any of the conditions of such bond.

"(c) Disposition of bale tags and certificates of tagging. If the bond is approved, an appropriate number of bale tags and certificates of tagging will be issued by the collector. The ginner shall attach one such bale tag to each bale of cotton ginned by him except those bales returned to the producer for storage as provided in article 13. The ginner shall keep an accurate record of, and account for, all bale tags and certificates of tagging issued to him, by serial number, as required in articles 10 and 11 of these regulations. In no event shall a ginner replace a bale tag or a certificate of tagging."

The Act itself is absolutely silent upon the question of the ginner applying for (1) bale tags, (2) exemption certificates, (3) lien cards, etc. It is likewise silent upon the question of a bond.

The provisions of the regulation in question are wholly without support in the text of the Act itself, and constitute an attempt by the Commissioner of Internal Revenue to legislate the ginner into the position of a bonded employee of the Treasury Department, without compensation.

Sec. 9.

Section 14(a) of the Act reads:

"Sec. 14(a). All provisions of law, including penalties, applicable with respect to the taxes imposed by section 800 of the Revenue Act of 1926, shall, in so far as applicable and not inconsistent with the provisions of this Act, be applicable with respect to taxes imposed by this Act."

Section 1102-(a) of the Revenue Act of 1926 reads:

"(a) Every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe."

Article 10 of the Regulations reads:

"Art. 10. Records of ginners. Every ginner shall keep an accurate daily record of ginning done on or after June 1, 1934. A separate record shall be kept for each plant where ginning is done. Such record shall show (1) the name and address of each owner for whom cotton is ginned, (2) the date of ginning, and (3) the net weight of each bale of lint cotton ginned. Such record shall show further how many pounds of cotton in each such bale (a) were harvested prior to June 1, 1934, (b) were harvested by a publicly owned experimental station or agricultural laboratory, (c) have a staple of 1 1/2 inches or longer, (d) are covered by an exemption certificate or certificates (together with the serial number of each such certificates), and (e) are subject to tax.

"If any bale is to be returned to the producer to be stored by him, the record shall show the serial number of the lien card attached to such bale. (See article 13). As to each other bale, the record shall show the serial number of the bale tag attached thereto and the serial number of the certificate of tagging delivered to the owner of the cotton. (See Chapter IV, Bale Tags)."

There is nothing in the text of the Act itself making the ginner liable for the tax, or for the collection thereof. Hence, the provisions of Article 10 are plainly beyond the terms of the Act itself, and constitute an unauthorized attempt by the Commissioner of Internal Revenue to legislate in regard to such matters.

Sec. 10.

Sec. 4(e) of the Act reads:

"4(e). No tax shall be imposed under this Act with respect to-

(1) Cotton harvested by any publicly owned experimental station or agricultural laboratory.

(2) An amount of cotton harvested in any crop year from each farm equal to its allotment.

(3) Cotton harvested prior to the crop year 1934-35.

(4) Cotton having a staple of one and one half inches in length or longer."

Article 9 of the Regulations reads:

"Art. 9. Exemption from the tax on ginning. (a) The ginning of cotton harvested by a publicly owned experimental station or agricultural laboratory is exempt from the tax. To be entitled to such exemption, the ginner shall procure an affidavit signed by a responsible executive officer of such station or laboratory. The affidavit shall be in duplicate and shall show (1) the name and address of such station or laboratory, (2) the location of the land on which the cotton was harvested, (3) the number of

bales of lint cotton resulting from the ginning with the quantity, in pounds, of each bale, and (4) the serial number of the bale tag attached to each bale.

(b) The ginning of cotton harvested during the effective period shall be exempt from the tax to the extent that such ginning is covered by exemption certificates. Exemption certificates covering allotments are furnished to producers by the Secretary of Agriculture. To be entitled to such exemption, the ginner must procure one or more certificates of exemption covering the amount of lint cotton resulting from such ginning.

(c) The ginning of cotton harvested prior to June 1, 1934, is exempt from the tax. To be entitled to such exemption, the ginner shall procure an affidavit from the person who owns the cotton at the time of ginning. The affidavit shall be in duplicate and shall show (1) the name and address of the owner of the cotton, together with the name and address of the producer, if they are different persons, (2) the location of the farm on which the cotton was harvested, (3) the year in which the cotton was harvested, (4) the location of the building where the seed cotton has been stored, (5) the number of bales of lint cotton resulting from the ginning with the quantity, in pounds, of each bale, and (6) the serial number of the bale tag attached to each bale.

(d) The ginning of cotton having a staple of 1 1/2 inches in length or longer is exempt from the tax. To be entitled to this exemption, the ginner shall procure from the person who owns the cotton at the time of the ginning, an affidavit in duplicate which shall state (1) the location of the farm on which the cotton was produced, (2) the date the cotton was ginned, (3) that the cotton has a staple of 1 1/2 inches in length or longer, (4) the number of bales of lint cotton resulting from the ginning with the quantity, in pounds, of each bale, and (5) the serial number of the bale tag to be attached to each bale.

(e) There must be filed with each return on which exemption from tax is claimed under (a), (b), (c), or (d) above, the required affidavit or affidavits, certificate or certificates, as the case may be."

There is no provision in the Act placing any duty or obligation on the ginner with regard to any of this exempt cotton, and the regulations making it the duty of the ginner to apply for the bale tags, exemption certificates, etc., and to keep the records in connection therewith are purely creatures of the Commissioner of Internal Revenue's attempt to legislate on the subject.

In short, your petitioners take the position that a careful and painstaking study of the entire Act will reveal that Sec. 13 (a) is the only provision that even mentions the ginner, or places any duties whatsoever upon him. The section reads:

"Sec. 13(a). All persons, in whatever capacity acting, including producers, ginners, processors of cotton, and common carriers, having information with respect to cotton produced, may be required to make a return in regard thereto, setting forth the amount of cotton delivered, the name and address of the person who delivered said cotton, the amount of lint cotton produced therefrom, and any other and further information which the Commissioner, with the approval of the Secretary of the Treasury and the Secretary of Agriculture, shall by regulations prescribe as necessary for theproper administration of the tax. Any person required to make such return shall render a true and accurate return to the Commissioner."

If the Act be valid, the ginner can be required to furnish the return above called for, but there his duty stops.

The burdens of (1) giving a bond, (2) applying for bale tags, tagging certificates and lien cards, (3) having the care, custody and financial responsibility of same throughout the ginning season, (4) being responsible for the cotton until it is tagged and removed, (5) having to place tags on the cotton when ginned, (6) having to collect and account for exemption certificates or the tax itself, (7) having to place lien cards on the cotton to be stored, and obtain the affidavits therefor, (8) having to make monthly reports to the Collector, and (9) having to account to the Collector for exemption certificates, or tax money, on every pound f cotton ginned, are all purely creatures of regulations issued by the Collector of Internal Revenue, and have absolutely no foundation in the Act itself.

It is most respectfully asserted that the Act itself places the duty of obtaining the exemption, or paying the tax, upon the farmer himself, and the duty of collecting the tax upon the Collector of Internal Revenue. That purely as a matter of convenience, and wholly without any support therefor in the Act itself, the Commissioner of Internal Revenue, by Regulations 84, has made the ginners of Texas bonded employees of the Department, without compensation, and at their own cost and expense, to perform onerous duties which belong either to the farmer or the Collector of Internal Revenue. That under the above authorities, the Commissioner of Internal Revenue was wholly without authority to thus legislate, and that such regulations are void.

Briefly summing up, plaintiffs submit that the foregoing authorities and argument fully sustain the propositions:

(1) That D. C. Wallace is entitled to maintain this action as a class suit.

(2) That the Texas Cotton Ginners Association has the right to maintain this action for and in behalf of its members.

(3) That S. D. Bennett, United States District Attorney for the Eastern District of Texas, is both a proper and necessary party.

(4) That this Court has jursidiction of the persons of all defendants, and can enjoin them on behalf of all cotton ginners of Texas.

(5) That the jurisdictional amount of more than $3,000.00, exclusive of interest and costs, is shown.

(6) That, being an action involving a purported revenue Act this Court would have jurisdiction irrespective of the amount involved.

(7) That this cause does not come within the inhibition of Section 3224.

(8) That this cause is not a suit against the United States.

(9) That there being property rights involved, irreparable damage shown, and extraordinary circumstances present, these plaintiffs are entitled to relief by way of injunction.

(10) That the Bankhead Act is unconstitutional and void as being an attempt, under the guise of a so called tax, to regulate and control the production and ginning of cotton, purely local matters, in violation of the Tenth Amendment to the Federal Constitution.

(11) That the Bankhead Act is unconstitutional and void as being an attempt, under the guise of a so called tax which is in reality a penalty, to control the production and ginning of cotton, purely local matters, in violation of the Tenth Amendment to the Federal Constitution.

(12) That the Bankhead Act is unconstitutional and void as depriving the cotton ginners of Texas of their liberty and property without due process of law, in violation of the Fifth Amendment to the Federal Constitution.

(13) That the Bankhead Act is unconstitutional and void as being an unwarranted delegation of legislative power to executive officers.

(14) That the regulations hereinabove complained of are void, as being broader than, and without support in,

the Act itself, and constituting an attempt by the Commissioner of Internal Revenue to legislate in the premises.

WHEREFORE, plaintiffs pray that they be granted the relief prayed for in their bill of complaint.

RESPECTFULLY SUBMITTED,

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Attorneys for Plaintiffs.